RECORD AND BRIEFS

16-980

Supreme Court, U.S.
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No. 16-___

In the Supreme Court of the United States

JON HUSTED, SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE;
NORTHEAST OHIO COALITION FOR THE HOMELESS;
AND LARRY HARMON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 16a0241p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3746

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON,

Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:16-cv-00303—George C. Smith, District Judge.

Argued: July 27, 2016

Decided and Filed: September 23, 2016

Before: SILER, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Stuart C. Naifeh, DĒMOS, New York, New York, for Appellants. Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

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CLAY, J., delivered the opinion of the court in which GIBBONS, J., joined, and SILER, J., joined in part. SILER, J. (pp. 22–25), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge.

The A. Philip Randolph Institute ("APRI"), the Northeast Ohio Coalition for the Homeless

("NEOCH"), and Larry Harmon (collectively "Plaintiffs") filed suit seeking to enjoin the defendant, Ohio Secretary of State Jon Husted ("the Secretary"), from removing the names of registered voters from Ohio's voter rolls pursuant to the state's so-called Supplemental Process, which Plaintiffs allege violates the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501 *et seq.*, and the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. § 20901 *et seq.* Plaintiffs also sought an injunction requiring the Secretary either to reinstate otherwise eligible voters who were improperly removed from the rolls pursuant to the Supplemental Process, or to count provisional ballots cast by such persons. Finally, Plaintiffs alleged that the change-of-address confirmation notices mailed to voters as part of the Supplemental Process fail to meet the standards for such notices set out in the NVRA, 52 U.S.C. § 20507(d)(2). Before us is Plaintiffs' appeal from the district court's order denying Plaintiffs' request for a permanent injunction and directing entry of judgment in favor of the Secretary. For the reasons set forth below, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

Factual History

In addition to maintaining procedures for removing the names of the deceased, those who have been adjudicated incompetent, and convicted felons from its voter rolls, *see* Ohio Rev. Code § 3503.18(A)–(C), Ohio utilizes two processes for identifying and purging from the rolls voters who are no longer eligible to vote because they have moved outside

their county of registration. *See* Ohio Rev. Code § 3503.21.[1] The first is Ohio's "NCOA Process," under which the Secretary's office compares the names and addresses contained in Ohio's Statewide Voter Registration Database to the National Change of Address ("NCOA") database. "The NCOA database contains names and addresses of individuals who have filed changes of address with the United States Postal Service." (R. 38-2, Damschroder Decl., ¶ 11.) The Secretary thereafter provides each county's Board of Elections ("BOE") with a list of voters registered therein who appear to have moved, based on the comparison of the two databases. The BOEs then "send[] a confirmation notice . . . to each individual identified." (*Id.*) That notice is a postage prepaid forwardable form on which the voter must indicate whether he or she still lives at the same address. Recipients of the notice are removed from the rolls if they: (1) do not respond to the confirmation notice or update their registration; *and* (2) do not subsequently vote during a period of four consecutive years that includes two federal elections.[2] *See* Ohio Rev. Code § 3503.21(A)(7), (B).

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[1] Both processes are performed on an annual basis. *See* Ohio Rev. Code § 3503.21(D).

[2] As discussed below, the NCOA Process mirrors the voter roll maintenance procedure outlined in Section 8, subsection (c) of the NVRA. *See* 52 U.S.C. § 20507(c). Because that subsection describes the NCOA Process as one way in which states "may" comply with their obligation under the NVRA to identify and remove voters who are no longer eligible due to a change of residence, *see* 52 U.S.C. § 20507(a)(4) and (c), the NCOA Process is sometimes referred to in this litigation as the "Safe-Harbor Process."

Ohio's so-called "Supplemental Process" is the second method the state uses for identifying and removing from the rolls voters who are no longer eligible to vote due to a change of residence. The Supplemental Process is largely identical to the NCOA Process, except in the way it begins: rather than identifying voters who may have moved by reference to the NCOA database, each county's BOE compiles a list of registered voters who have not engaged in any "voter activity" for two years. For the purposes of the Supplemental Process, "voter activity" includes "filing a change of address" with a designated state agency; "filing a voter registration card with the [BOE]; . . . casting an absentee ballot; casting a provisional ballot; [or] voting on election day."[3] (R. 42-1, Damschroder Dep., PageID 1548–49.) After compiling a list of inactive voters, each BOE sends a confirmation notice to those on its list. As with the NCOA Process, voters sent a confirmation notice are removed from the rolls if they subsequently fail to vote for four years and fail to either respond to the notice or re-register. In sum, under the Supplemental Process, a voter is purged from the rolls after six years of inactivity—even if he or she did not move and otherwise remains eligible to vote.

When this litigation began, the confirmation notices sent to voters pursuant to both the NCOA Process and Supplemental Process required that voters provide their name, current Ohio address,

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[3] According to the Secretary, BOEs carrying out the Supplemental Process "also have discretion to consider whether signing a candidate, issue, or local option petition is viewed as voter activity." (R. 38, Def.'s Merits Br., PageID 257.)

date of birth, and either their Ohio driver's license number, their Social Security number, or a copy of a document verifying their identity and address. The notices required that voters provide such information regardless of whether they had changed address or were merely confirming that they still lived at the same address. Moreover, the notices did not adequately inform voters of the consequences of failing to respond to the notice; rather, the form indicated that the recipient's registration "may" be canceled if he or she did not respond, re-register, or vote in the next four years. (R. 42-13, 2015 Conf. Notice Form, PageID 1702.) Finally, the form failed to inform voters who had moved outside of Ohio on how they could remain eligible to vote in their new state.

As discussed below, the Secretary issued a new confirmation notice form during the pendency of this litigation. On the newly issued form, voters can confirm that they have not changed address by simply signing, dating, and returning the postage prepaid form. The new form also provides voters with the dates by which they must either return the form or vote in order to remain registered. Notably, however, the new form still lacks information on how persons who have moved to another state can register to vote in their new state.

Procedural History

This case began with two letters sent by NEOCH and APRI to the Secretary in December 2015 and February 2016, respectively. Both letters asserted that Ohio's Supplemental Process violated Section 8 of the NVRA. Not long after sending their letters, APRI and NEOCH representatives began meeting

with the Secretary in an attempt to resolve their concerns without litigation. Those meetings failed to produce results, causing Plaintiffs to file this suit in federal district court on April 6, 2016. Plaintiffs' complaint alleged two causes of action relevant to this appeal: first, that the Supplemental Process unlawfully removes registered voters from the rolls due to their failure to vote in violation of Section 8, subsection (b)(2) of the NVRA, 52 U.S.C. § 20507(b)(2); and second, that the confirmation notices sent to voters under both the NCOA Process and the Supplemental Process fail to meet the standards for such forms set out in the NVRA, 52 U.S.C. § 20507(d)(2).

The day after filing their complaint, Plaintiffs moved for a temporary restraining order ("TRO") prohibiting the Secretary from "removing eligible Ohio voters from the voter rolls on account of their failure to vote pursuant to Ohio's 'Supplemental Process.'" (R. 9, Mot. for TRO, PageID 36.) Plaintiffs' motion also requested a preliminary injunction compelling the Secretary to reinstate voters already removed from the rolls pursuant to the Supplemental Process. Four days later, Plaintiffs agreed to withdraw their request for a TRO in exchange for the Secretary's agreement not to initiate the Supplemental Process prior to July 1, 2016. A week after Plaintiffs filed their complaint, the parties agreed to engage in limited discovery and to address all the dispositive issues in the case through simultaneous briefing. The parties filed their briefs in May and June of 2016, with Plaintiffs styling their briefs as memoranda supporting motions for summary judgment and a preliminary injunction. On June 17, 2016—the day the parties'

final briefs were due before the district court—the Secretary issued a directive requiring BOEs to use a new version of the confirmation notice form. As discussed above, that new form corrected all but one of Plaintiffs' alleged deficiencies.

On June 29, 2016, the district court issued an order denying Plaintiffs' motions for summary judgment and a preliminary injunction; the order directed entry of judgment in favor of the Secretary. Addressing the parties' arguments under permanent injunction standards, the court began by rejecting Plaintiffs' arguments that the Supplemental Process violates the NVRA and the HAVA. The court held that because Section 8 of the NVRA does not explicitly dictate what information states may or must use as a "trigger" for sending a confirmation notice, that decision was impliedly left to the states. The court also concluded that the Supplemental Process does not violate the NVRA and the HAVA's prohibition on removing voters from the rolls solely by reason of their failure to vote because such removal occurs only after a voter has failed to vote *and* failed to respond to a confirmation notice.

Turning to the Plaintiffs' arguments regarding the legality of Ohio's confirmation notice form, the district court first noted the Secretary's promise that his newly issued form would be used during the upcoming voter roll purges. Relying on that promise, the court held that the Secretary's voluntary cessation of illegal activity was sufficient to moot Plaintiffs' challenges to the confirmation notice form. Finally, the court rejected Plaintiffs' argument that the newly issued form still violated 52 U.S.C. § 20507(d)(2)(B) by failing to provide those who have

moved out of Ohio with information on how to stay registered. The court held that this argument was waived because Plaintiffs' briefing failed to raise the argument, and that the argument failed on the merits in any event because it "defies logic" that the NVRA would require local registrars to "coach" voters on how to register in a different state. (R. 66, Order, PageID 23025.) Thus having rejected all of Plaintiffs' arguments on the merits, the district court held that no preliminary injunction was warranted and that judgment should be entered for the Secretary.[4] Plaintiffs filed their notice of appeal the following day.

DISCUSSION

Standard of Review

The parties agree that there are no disputes regarding the facts recounted above, and that the district court's denial of Plaintiffs' request for an injunction was based solely on its interpretation of the NVRA and the HAVA. "When reviewing the decision of a district court to grant or to deny a request for issuance of a permanent injunction, . . . legal conclusions are reviewed de novo." *Sec'y of Labor, U.S. Dep't of Labor v. 3Re.com, Inc.*, 317 F.3d 534, 537 (6th Cir. 2003) (internal quotation marks omitted); *see also Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 680 (6th Cir.

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[4] Absent from this summary of the holdings in the district court's order is discussion of Plaintiffs' claim that Ohio's Supplemental Process is applied in a non-uniform manner in violation of 52 U.S.C. § 20507(b)(1). The district court rejected that claim, and Plaintiffs' briefing on appeal does not address it. We therefore conclude that the claim is forfeited. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997).

2006) ("[S]tatutory interpretation questions are issues of law, which we review de novo."). We also review de novo the district court's conclusion that some of Plaintiffs' claims are now moot. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001).

Analysis

I. Plaintiffs' Challenge to Ohio's Supplemental Process

Congress' stated purposes in enacting the NVRA were, *inter alia*, "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; . . . [and] to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). "These purposes counterpose two general, sometimes conflicting, mandates: To expand and simplify voter registration processes so that more individuals register and participate in federal elections, while simultaneously ensuring that voter lists include only eligible . . . voters." *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1274 (D. Colo. 2010). Those sometimes conflicting mandates are reflected in the language of Section 8 of the NVRA, 52 U.S.C. § 20507, which is where our analysis must begin. *See Lewis v. United States*, 445 U.S. 55, 60 (1980) ("[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself."). Importantly, Section 8's language pairs the mandate that states maintain accurate voter rolls with multiple constraints on how the states may go about doing so.

Those constraints begin with subsection (a) of Section 8, which states that "[i]n the administration

of voter registration for elections for Federal office, each State shall . . . provide that the name of a registrant *may not* be removed from the official list of eligible voters *except*" under certain circumstances. 52 U.S.C. § 20507(a)(3) (emphasis added); *see also* S. Rep. No. 103-6, at 19 (1993) ("[O]ne of the guiding principles of [the NVRA is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction."); H.R. Rep. No. 103-9, at 18 (1993). The Act then provides an exhaustive list of circumstances justifying removal: "criminal conviction or mental incapacity as provided by state law, the death of the registrant, or . . . a change of the registrant's residence." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 376 (6th Cir. 2008) (citing 42 U.S.C. § 1973gg-6(a)(3)–(4), now codified as 52 U.S.C. § 20507(a)(3)–(4)). This case concerns the final circumstance justifying removal—change of residence—which is subject to its own mandate and accompanying constraints. Subsection (a)(4) of Section 8 requires that states "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant;" the Act thereafter specifies that any such program must be conducted "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B) . . . .

Subsection (b) provides two additional constraints on states' discretion. First, all roll maintenance procedures must "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 *et seq.*)." *Id.* § 20507(b)(1). Second, and more pertinent to this appeal, subsection (b)(2) provides that roll maintenance procedures "shall not

result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* § 20507(b)(2). This language from subsection (b)(2) was later modified by the HAVA, which appended the following clause to the general prohibition on removal by reason of failure to vote:

> . . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> >
> > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Id. By the HAVA's own terms, however, this language is not to "be construed to authorize or require conduct prohibited under . . . or to supersede, restrict, or limit the application of . . . [the NVRA]." *Id.* § 21145(a); *see also* H.R. Rep. 107-329, at 37 (2001) (indicating that under the HAVA, "removal of those deemed ineligible must be done in a manner consistent with the [NVRA]. The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, [the HAVA] leaves NVRA intact, and does not undermine it in any way.").

Subsections (c) and (d) of Section 8 provide two final constraints on states' roll maintenance procedures. First, subsection (c)(2)(A) provides that "any program the purpose of which is to systematically remove the names of ineligible voters from the official list of eligible voters" must be completed "not later than 90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. § 20507(c)(2)(A). Second, subsection (d)(1) establishes that states "*shall not* remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence" without first subjecting the registrant to the confirmation notice procedure outlined in that subsection. *Id.* § 20507(d)(1) (emphasis added). That mandatory confirmation notice procedure is the one described above as the final step of Ohio's NCOA Process and Supplemental Process: a forwardable postage prepaid and pre-addressed form is sent to a voter, and the voter is removed from the rolls if (1) he or she does not respond to the confirmation notice or update his or her registration, *and* (2) he or she does not subsequently vote during a period of four consecutive years that includes two federal elections. *See id.* § 20507(d).

Finally, we note that in subsection (c)(1) of Section 8, Congress provided states with an example of a procedure for identifying and removing voters who had changed residence that would comply with the NVRA's mandates and accompanying constraints. That subsection provides that "[a] State *may* meet the requirement of subsection (a)(4) by establishing a program under which" voters who appear to have moved based on information

contained in the NCOA database are sent subsection (d) confirmation notices. *See id.* § 20507(d)(1) (emphasis added). The parties do not dispute that Ohio's NCOA Process mirrors this so-called "safe-harbor" procedure and that the NCOA Process is thus permissible under the NVRA.

The focus of this case, therefore, is Ohio's Supplemental Process. Specifically, Plaintiffs argue that the Supplemental Process violates the clause of subsection (b)(2)—hereinafter referred to as the "prohibition clause"—prohibiting roll maintenance processes that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* § 20507(b)(2). The Secretary responds that the Supplemental Process is permitted by the exception to subsection (b)(2)'s prohibition clause added by the HAVA—hereinafter referred to as the "except clause"—which states: ". . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)." *Id.* The legality of Ohio's Supplemental Process can therefore be boiled down to two questions: whether the Process is expressly permitted by subsection (b)(2)'s except clause; and, if not, whether the Supplemental Process violates that subsection's prohibition clause.

A. The Supplemental Process is not expressly permitted by subsection (b)(2)'s except clause

Turning to the first operative question, it bears repeating that the Supplemental Process fully incorporates subsection (d)'s confirmation notice

procedure. Certainly, under the except clause's plain language, such incorporation is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote. *See id.* § 20507(b)(2) and (d)(1)(B)(ii). But that conclusion does not end our inquiry—the Supplemental Process does not *only* employ subsection (d)'s confirmation notice procedure. Rather, under the Supplemental Process, the confirmation notice procedure is "triggered" by a registrant's failure to engage in any "voter activity" for two years. We must therefore determine whether that trigger provision should be analyzed separately from the confirmation notice procedure, such that the trigger is subject to the prohibition clause; or, in the alternative, whether the Supplemental Process' incorporation of the confirmation notice procedure means that the entire Process—including the trigger—is permitted under the except clause.

The Secretary advocates for the second of these two positions. He states, for example, that "[t]he language that a cancellation 'shall not result' from a 'failure to vote' 'except' when coupled with the failure to 'respond[]' to an address-confirmation inquiry authorizes the Ohio Supplemental Process." (Def.'s Br. at 27 (emphasis omitted); *see also id.* at 41.) The operative language in this argument is the phrase "when coupled with," by which the Secretary implies that a process resulting in removal by reason of failure to vote is nevertheless permitted by the except clause so long as it is "coupled with" the procedures outlined in subsection (d). We note, however, that neither the phrase "when coupled with," nor any comparable language, appears in the

except clause's text.[5] *See* 52 U.S.C. § 20507(b)(2). The Secretary's argument is therefore flawed insofar as it requires us to "read[] a phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

Moreover, the Secretary's reading of the except clause would require us to ignore the traditional rule of statutory construction dictating that exceptions to a statute's general rules be construed narrowly. *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) ("In construing [statutes] in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *Detroit Edison Co. v. Sec. & Exch. Comm'n*, 119 F.2d 730, 739 (6th Cir. 1941) ("Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general language."); *see also* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:11, at 246–47 (6th ed. 2000) ("Subsidiary clauses which limit the generality of a rule are narrowly construed, as they are considered exceptions."). Contrary to that general rule, the Secretary would have us adopt an expansive interpretation of the except clause under

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[5] In a similar vein, the Secretary asserts that the except clause "authorizes removals that follow the procedures in subsections (c) and (d)." (Def.'s Br. at 27 (emphasis omitted).) This argument again adds language to the except clause, which does not authorize all "*removals that follow* the procedures in subsections (c) and (d)" (*id.* (emphasis added)); rather, the clause simply permits states to "us[e] the procedures" in those subsections. *See* 52 U.S.C. § 20507(b)(2).

which states can not only "us[e] the procedures described in subsections (c) and (d)," 52 U.S.C. § 20507(b)(2); rather, under the Secretary's interpretation, use of those procedures would render states' processes completely immune to the general rule that the except clause modifies. We decline to adopt this interpretation, and instead err on the side of giving maximum effect to the prohibition clause's general rule. *See, e.g.*, Singer, *supra*, § 47:11, at 250–51 ("[W]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.").

Further counseling against the Secretary's interpretation is the fact that reading "when coupled with" into the except clause would reduce the prohibition clause to mere surplusage. That is because the plain language of subsection (d)(1) provides that processes for removing voters based on change in residence *must* incorporate subsection (d)'s confirmation notice procedure. *See* 52 U.S.C. § 20507(d)(1). In other words, it is *required* that such processes be "coupled with" subsection (d)'s procedure. Thus, under the Secretary's interpretation, subsection (b)(2)'s prohibition clause would serve no purpose because all state procedures would necessarily be permitted by the except clause by virtue of their (mandatory) incorporation of the confirmation notice procedure. This reading of the NVRA would contravene the Supreme Court's repeated insistence that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014)

(quoting *Corley v. United States*, 556 U.S. 303, 312 (2009)).

The Secretary responds that his interpretation does not reduce the prohibition clause to surplusage because when read together, the prohibition and except clauses constitute a single "belt-and-suspenders" rule that merely "explains what is permitted and what is prohibited by describing both sides of the same coin." (Def.'s Br. at 49 (citing *TMW Enter., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 577 (6th Cir. 2010)).) In other words, the Secretary would have us hold that subsection (b)(2) only prohibits processes that do not incorporate the confirmation notice procedure, and that the except clause simply reinforces that prohibition by expressly "permitt[ing]" use of the confirmation notice and safe-harbor procedures. (*Id.*) But this argument once again ignores the fact that subsection (d)(1) already mandates that "[a] State *shall not* remove the name of a registrant from the official list of voters" without performing the confirmation notice procedure. 52 U.S.C. § 20507(d)(1) (emphasis added). We decline to read subsection (b)(2) as a mere reiteration of that mandate. Perhaps more importantly, we find that the Secretary's "belt-and-suspenders" argument ignores the NVRA's plain language: subsection (b)(2)'s clauses are not written as alternative presentations of the same rule; rather, those clauses explicitly establish a general rule with a proviso. *See id.* § 20507(b)(2).

The Secretary also argues that the Senate and House reports accompanying the NVRA justify his interpretation of the except clause. Those reports both state, in pertinent part:

> Almost all states now employ some procedure for updating lists at least once every two years, though practices may vary somewhat from county to county. About one-fifth of the states canvass all voters on the list. The rest of the states do not contact all voters, but instead target only those who did not vote in the most recent election (using not voting as an indication that an individual might have moved). Of these, only a handful of states simply drop the non-voters from the list without notice. These states could not continue this practice under [the NVRA].

S. Rep. No. 103-6, at 46 (1993); H.R. Rep. No. 103-9, at 30 (1993). This passage in the reports, the Secretary argues, suggests that subsection (b)(2)'s prohibition is intended to invalidate only those state processes that "simply drop the non-voters from the list without notice." *Id.* Thus, the argument goes, the reports indicate that the except clause permits any process that incorporates subsection (d)'s confirmation notice procedure.

This argument is problematic for at least two reasons. First, we may only look to the legislative history of a statute to "explain the meaning and purpose of a provision whose text is genuinely ambiguous." *Sherfel v. Newson*, 768 F.3d 561, 569 (6th Cir. 2014). As discussed above, the unambiguous language of Section 8 requires rejecting the Secretary's interpretation, lest we be forced to simultaneously write new language into, and essentially excise language out of, the NVRA. But even if we did conclude that the NVRA's language is ambiguous, we would find little solace in the even more ambiguous language of the

congressional reports on which the Secretary relies. *Cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[L]egislative history is itself often murky, ambiguous, and contradictory."). Not only is the above-quoted passage from the congressional reports internally unclear as to which of the practices described therein is prohibited under the NVRA, the passage does not purport to provide an exhaustive list of processes that subsection (b)(2) was designed to prohibit. *See* H.R. Rep. No. 103-9, at 30 (1993); S. Rep. No. 103-6, at 46 (1993).

Based on the above, we reject the Secretary's contention that the Supplemental Process' incorporation of subsection (d)'s confirmation notice procedure means that the entire Supplemental Process is automatically permitted under the except clause. That interpretation of the NVRA would require us to improperly ignore "the language and design of the statute as a whole." *Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (quoting *United States v. Parrett*, 530 F.3d 422, 429 (6th Cir. 2008)). We further conclude that the only reasonable reading of the NVRA is that any part of a state's roll maintenance process that does not mimic the expressly permitted procedures outlined in subsections (c) or (d)—in this case, the Supplemental Process' two-year "trigger" provision—is subject to subsection (b)(2)'s prohibition clause.

B. The Supplemental Process violates subsection (b)(2)'s prohibition clause

Having concluded that we must focus our analysis on the Supplemental Process' two-year trigger provision, we turn to the second dispositive question

in this case: whether that trigger provision "*result*[*s*]" in removal by reason of failure to vote. 52 U.S.C. § 20507(b)(2) (emphasis added). We typically "proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (internal brackets and quotation marks omitted) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.'" *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002). In this case, the Supplemental Process' trigger provision explicitly uses a person's failure to engage in any "voter activity"—which includes voting—for two years as the "trigger" for sending a confirmation notice. Under the ordinary meaning of "result," the Supplemental Process would violate the prohibition clause because removal of a voter "proceed[s] or arise[s] as a consequence" of his or her failure to vote. *Id.*

As noted by the Secretary and the district court, however, subsection (b)(2)'s prohibition clause appears to have been given a more narrow interpretation by the HAVA. Passed in 2002, the HAVA created an "independent . . . requirement [that states] maintain an accurate list of eligible voters." *Colón-Marrero v. Vélez*, 813 F.3d 1, 13 (1st Cir. 2016). In connection with that requirement, the HAVA requires states to implement

> [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible

> voters. Under such system, consistent with the National Voter Registration Act of 1993 ([52 U.S.C. § 20501] et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed *solely* by reason of a failure to vote.

52 U.S.C. § 21083(a)(4)(A) (emphasis added). This section of the HAVA, the Secretary argues, restates the NVRA's prohibition and except clauses "in slightly different words" (Def.'s Br. At 32), and in so doing suggests that subsection (b)(2)'s prohibition on consideration of failure to vote only operates to prohibit state processes that remove registrants from the rolls "solely" by reason of their failure to vote.

In the end, however, this language from the HAVA does not change our analysis because operation of the Supplemental Process' trigger is ultimately based "solely" on a person's failure to vote. This is so, notwithstanding the fact that the Supplemental Process includes voting as one of several types of "voter activity" in which a voter must fail to engage in order to trigger the sending of a confirmation notice. We must assume not only that Congress intended the prohibition clause to play some role in the NVRA's statutory scheme, *see Clark*, 134 S. Ct. at 2248, but also that Congress intended the prohibition to be more than a paper tiger. But the clause would have no teeth at all if states could circumvent it by simply including "voting" in a disjunctive list of activities in which a registrant must fail to engage in order to "trigger" the confirmation notice procedure. In more concrete

terms, a state cannot avoid the conclusion that its process results in removal "solely by reason of a failure to vote," 52 U.S.C. § 21083(a)(4), by providing that the confirmation notice procedure is triggered by a registrant's failure either to vote *or* to climb Mt. Everest *or* to hit a hole-in-one.

For his part, the Secretary reiterates that the Supplemental Process incorporates subsection (d)'s requirement that the voter must fail to respond to a confirmation notice before that voter can be removed from the rolls. He thereafter argues that the Process' incorporation of that failure-to-respond requirement insures that voters are never removed "solely" for failure to vote. But this argument merely rehashes the one we rejected above—that a state's process for identifying and removing voters who have changed residence comports with subsection (b)(2)'s prohibition clause so long as it incorporates subsection (d)'s confirmation notice procedure. This interpretation of the NVRA would render the prohibition clause entirely superfluous because subsection (d)(1) already requires states to use the confirmation notice procedure. *See* 52 U.S.C. § 20507(d)(1). Once again, we decline "to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011).

Finally, we note that the parties' arguments and the district court's order raise two additional questions: (1) whether processes for identifying and removing from the rolls voters who have changed residence *must* have provisions that "trigger" subsection (d)'s confirmation notice procedure; and

(2) what the NVRA and the HAVA have to say, if anything, about the form such "triggers" can or cannot take. While these questions are undoubtedly important, we need not answer them in order to hold that Ohio's Supplemental Process is impermissible under the NVRA. Regardless of whether "trigger" provisions are required, and regardless of what forms such "triggers" can or cannot take, it is clear that the Supplemental Process *does* include a trigger, and that that trigger constitutes perhaps the plainest possible example of a process that "result[s] in" removal of a voter from the rolls by reason of his or her failure to vote. 52 U.S.C. § 20507(d)(2). We therefore hold that Ohio's Supplemental Process violates Section 8, subsection (b)(2) of the NVRA.

II. Plaintiffs' Challenge to Ohio's Confirmation Notice Form

Below, the district court held: (1) that Plaintiffs' challenges to Ohio's confirmation notice form were mooted by the Secretary's adoption of a new form that addressed all but one of Plaintiffs' concerns; and (2) that Plaintiffs' remaining challenge to the form—that it fails to provide out-of-state voters with information on how to remain registered—is not supported by Section 8's statutory language.[6] We address these holdings in turn.

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[6] On appeal, the Secretary reiterates these arguments, but adds that Plaintiffs no longer have standing to bring their remaining challenge to the notice form because they have not shown that either they or their members have moved out of state—i.e., that they have been injured by the form's failure to provide registration information to out-of-state movers. This standing argument, however, is merely a mootness argument presented in another form. *Cf. Cleveland Branch, N.A.A.C.P.*,

A. Mootness

Claims become moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Generally, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Id.* (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). However, a narrow exception to that general rule exists in cases where a defendant claiming that its voluntary compliance moots a case successfully carries "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Davis*, 440 U.S. at 631 (holding that voluntary cessation can render an issue moot if "there is no reasonable expectation . . . that the alleged violation will recur" (citation and internal quotation marks omitted)). We have stated that it is a "rare instance" in which this standard will be met. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008).

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263 F.3d at 525 ("[S]tanding concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct was occurring at the time the complaint was filed, . . . while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation." (citation and internal quotation marks omitted)). The Secretary does not dispute that Plaintiffs had standing to challenge the confirmation notice form at the outset of this litigation. We therefore do not address the Secretary's standing argument further.

The Secretary argues that because he is a governmental actor, we should defer to his assurances that his recent changes to the confirmation notice form are permanent. Although it is true that "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties," *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)), such solicitude does not carry much of an official's burden of demonstrating that "there is no reasonable expectation . . . that the alleged violation will recur," *Davis*, 440 U.S. at 631. Indeed, the Supreme Court has declined to defer to a governmental actor's voluntary cessation, even where that cessation occurred pursuant to legislative process. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("[T]he city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."); *see also League of Women Voters of Ohio*, 548 F.3d at 474 ("It is hard to see how the voluntary passage of legislation or issuance of directives can moot claims such as these." (footnote omitted)).

Nevertheless, apparently relying on such solicitude, the district court held that Plaintiffs' claims were moot because "[t]here is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future." (R. 66, PageID 23024.) We note as an initial matter, however, that this holding gets it backwards: Plaintiffs were not required to produce evidence suggesting that the Secretary planned on reengaging

in the allegedly illegal behavior after resolution of the case. *See Laidlaw*, 528 U.S. at 190. Rather, it was—and remains—the Secretary's "formidable burden" of "showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The Secretary has failed to meet that burden in this case.

To begin, the new confirmation notice form was issued pursuant to the Secretary's "directive," rather than any legislative process. Thus, this is not a case in which reversing the cessation would be particularly burdensome. *Cf. Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012) (holding that the relevant issue was mooted by the defendant municipality's ordinance that was "years in the making"). Indeed, it appears from the record that the confirmation notice form is revised on a relatively frequent basis—at least four times in the last nine years, not counting the most recent revision. And because the Ohio Secretary of State is an elected official, there remains a distinct possibility that a future Secretary will be less inclined to maintain the confirmation notice in its current form. Finally, we note that the circumstances of the Secretary's issuance of the new form do not inspire confidence in his assurances regarding the likelihood of recurrence—he issued that new form on the same day as the parties' final merits briefs were due before the district court, attaching the form as an exhibit to his brief and only then presenting his mootness argument. This fact makes the Secretary's voluntary cessation appear less genuine. *See id.* (noting that the defendant municipalities' voluntary cessation "appear[ed] genuine").

Given these facts, we conclude that the Secretary has not carried his burden of showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190. Plaintiffs' challenges to the confirmation notice therefore have not been rendered moot by the new form. Even if we felt differently about the possibility of recurrence, however, that alone would not render Plaintiffs' request for an injunction moot. A claim becomes moot only if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631; *see also Ragsdale*, 841 F.2d at 1365 (noting that an issue is moot only if "there are no remaining effects of the alleged violation"). As Plaintiffs note, the Secretary's newly-issued form does nothing to correct the fact that Ohio has, for years, been removing voters from the rolls because they failed to respond to forms that are blatantly non-compliance with the NVRA. Thus, in any event, the new form could not render all of Plaintiffs' claims for relief moot. *Cf. Anderson v. Spear*, 356 F.3d 651, 655 (6th Cir. 2004) ("As is readily apparent, the action of the legislature suspending the operation of certain provisions of the campaign law [in 2003] does not eliminate the case or controversy which existed by the operation of those laws in 1999.").

B. Merits

The final question before us concerns the merits of Plaintiffs' remaining challenge to the newly issued confirmation notice form. Plaintiffs argue that the form does not comply with the NVRA's mandate, contained in subsection (d)(2)(B) of Section 8, that

"[i]f the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered," any confirmation notice sent to that voter must provide "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B). Plaintiffs assert that the newly issued form violates this provision because it does not provide Ohio registrants who have moved out of state with information on how to re-register in their new state.[7] This requirement could be satisfied, Plaintiffs contend, by simply modifying the confirmation notice to direct the recipient to the Federal Election Assistance Commission's website, on which the recipient will find "instructions and guidance for voter registration in all states." (Pls.' Br. at 44 n.15.)

Below, the district court held that it "defies logic that the NVRA would saddle the various secretaries of state (or their equivalents) with the onerous burden of coaching out-of-state residents through the registration process in their new states of residence." (R. 66, PageID 23025.) In support of this assertion, the court noted that the subsection on which Plaintiffs' argument is based provides that states must supply registrants with information on how to "*continue*" to be eligible to vote. (*Id.* (quoting 52 U.S.C. § 20507(d)(2)(B)).) Without much additional

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[7] Below, the district court concluded that this argument was waived because "Plaintiffs . . . raised this argument for the first time in their Reply brief." (R. 66, PageID 23024.) This was error; Plaintiffs' motion for summary judgment explicitly argued that Ohio's confirmation notice forms "do[] not tell people who have moved out of the state how they can register in their new state." (R. 39, Pls.' Mot. for Summ. J., PageID 1407 (citing 52 U.S.C. § 20507(d)(2)(B)).)

analysis, the district court proclaimed that the word "continue" necessarily means "continue to vote within that State—not register in another state." (*Id.*) The Secretary's arguments on appeal buttress this conclusion by arguing that "[n]o voter can 'continue to be eligible' to vote by moving from Ohio to Michigan, . . . [r]ather, the new Michigander must become a *newly registered* Michigan voter." (Def.'s Br. At 54.)

We find this argument unavailing. To begin, subsection (d)(2)(B)'s plain language contains no intra-state limitation. *See* 52 U.S.C. § 20507(d)(2)(B). Instead, that subsection provides that information on how to continue to be eligible to vote must be presented to anyone who "has changed residence to a place outside the registrar's jurisdiction." *Id.* The "outside the registrar's jurisdiction" language is the part of subsection (b)(2)(B)'s mandate that establishes its geographic applicability—had Congress intended to place geographic limitations on the mandate, it would have done so with this language rather than relying on a counterintuitive definition of the word "continue." Moreover, that word—"continue"—must be accorded its ordinary meaning. *Cloer*, 133 S. Ct. at 1893 ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."). "Continue" means to "keep up or maintain esp[ecially] without interruption a particular condition." Webster's Third New International Dictionary 493 (1986). Certainly, a registrant can "keep up or maintain . . . without interruption," *id.*, her condition of being "eligible to vote," 52 U.S.C. § 20507(d)(2)(B), regardless of

whether she must fully re-register or merely confirm her new address.

Further weighing against the Secretary's interpretation of subsection (d)(2)(B)—whereby "continuing" to vote excludes situations in which voters must fully re-register—is the fact that some states require voters to fully re-register even when they move to a new jurisdiction within the same state. *See, e.g.*, N.J. Stat. § 19:31-11 ("A voter who moves from an election district in one county to an election district in another county prior to the close of registration preceding an election shall register in the new county of residence . . . ."); Okla. Stat. tit. 26, § 4-118 ("Any registered voter who changes his or her residence to another county may apply for registration as an initial registrant in such other county."). Indeed, the 2007 version of Ohio's confirmation notice form suggests that Ohio itself once required voters who moved between counties to fully re-register. Under the Secretary's reasoning, intra-state movers subject to such re-registration requirements would not be entitled to "information concerning how [they] can continue to be eligible to vote," 52 U.S.C. § 20507(d)(2)(B), because the requirement that they re-register means that they are not "continuing" to be eligible to vote. Not only would this outcome completely defeat the purpose of subsection (d)(2)(B)'s mandate in states with re-registration requirements it would contradict the Secretary and district court's own conclusion that the word "continue" operates to free states of subsection (b)(2)(B)'s mandate with regard to out-of-state movers only.

In sum, we conclude that the district court erred by holding that Plaintiffs' claims regarding Ohio's confirmation notice are moot, and that the court erred by concluding that Ohio need not provide out-of-state movers with information on how they can continue to be eligible to vote.

CONCLUSION

For the reason state above, we **REVERSE** the district court's judgment and **REMAND** for further proceedings consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

SILER, Circuit Judge, dissenting in part and concurring in part.

Because of the urgency of this issue and the need to allow the Supreme Court to consider it, I write the dissent/concurrence in condensed fashion. It does not reflect the extent to which I disagree with the majority opinion, although I respect it.

I commend the Secretary for issuing a new confirmation notice form during the pendency of this litigation. In all aspects of the law, except for directions on how the voter can continue his registration, it complies with the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).

Both sides agree that the language of the NVRA is unambiguous. "If the words of the statute are

unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced." *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005) (quoting *Hudson v. Reno*, 130 F.3d 1193, 1196 (6th Cir. 1997)).

This seems to be a much simpler process than as outlined in the majority opinion. The Secretary has established a Supplemental Process for purging voters from the voting rolls in Ohio. The key language in the statute attacked by the plaintiffs is from 52 U.S.C. § 20507(b)(2), which directs that States shall not remove "the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." However, that same subsection allows a State to use "the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters" under certain circumstances. *Id.* That subsection indicates that if the voter

> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office,

then subsection (d) provides how States may cancel registrations of those who may have changed addresses. *Id.* It provides that the registrant should not be removed from the list of voters unless he or she confirms that he or she has changed residence or has failed to respond to a notice described in paragraph (2) and has not voted during a certain period of time. 52 U.S.C. § 2507(d)(1).

The part of the statute which is in contention is § 20507(b)(2), which indicates that the State shall not remove the voter "by reason of the person's failure to vote." The Secretary indicates that the person is not removed from the voting rolls until after the registrant is sent a notice by mail to find out if he or she still lives at the old address. Not until that person fails to respond, as plaintiff Larry Harmon did, does the State then list the voter as "inactive" in the registration database. Nevertheless, this "inactive" voter has all the rights to cast a regular ballot at any election, but if four years transpire without the registrant's voting, his or her registration record is canceled. However, if the registrant has any voting activity during those four years, he or she returns to an active voter status.

The text of the NVRA directs the States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" death or relocation. 52 U.S.C. § 20507(a)(4). The district court found the Secretary has made a reasonable effort to carry out that mandate, and I agree. The State cannot remove the registrant's name from the rolls for a failure to vote only, and Ohio does not do so. It removes registrants only if (1) they have not voted or updated their registration for the last two years, (2) also failed to respond to the address-confirmation notice, and (3) then failed to engage in any voter activity in four consecutive years, including two consecutive Federal elections following that notice.

The decision of the district court also follows the language in HAVA. The district court cited the following language from that act:

> [C]onsistent with the National Voter Registration Act of 1993 . . . , registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

52 U.S.C. § 21083(a)(4). As the Secretary has explained, it is his position that no voter is removed solely by reason of a failure to vote, and thus he has complied with the language from both statutes. I agree. The statutes leave it to the States to implement, and Ohio has developed a lawful procedure.

On the question of mootness, I agree with the majority that the plaintiffs had standing to bring the challenge to the notice form when the case was filed. However, I disagree with the conclusion that this case is not moot because the issues, save one, concerning the confirmation notice form have been corrected by the Secretary. Cessation of certain "conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990) (quoting *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)). I agree with the district court that there is no evidence to show that the Secretary would change the current notice, and this court should give him deference on that question. However, I concur with the majority that the current notice does not comply with the

NVRA final mandate that when the Secretary sends the confirmation notice that the registrant has been purged, the notice must provide "information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B).

The district court found that this issue was waived by the plaintiffs for failure to include it in their pleadings before filing their reply brief. However, their motion for summary judgment argued that the confirmation notice forms do not advise people who have moved out of the State how they could register in their new State. Although I agree with the district court that the State officials have been given an "onerous burden of coaching out-of-state residents through the registration process in their new States of residence," that is what the statute requires. The district court ruled that the mandate only applies to give the registrant information about registering in another location in Ohio, but the language of the statute is broader than that. In their brief on appeal, plaintiffs have suggested that an easy way to comply would be by directing voters to the Election Assistance Commission's website containing the federal form, which provides instructions and guidance for voter registration in all States. Although such a notice should be easy to attach to the notification to the registrants, it assumes that all registrants know how to utilize websites. Nevertheless, that is the relief which the plaintiffs have requested, and it seems simple enough for the Secretary to institute that amendment to the notice.

Therefore, I would affirm the decision of the district court, except insofar as it declined to require

the Secretary to amend its notice to voters who have moved to other States. I would grant relief on that sole issue.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3746

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON,

Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State,

Defendant-Appellee.

Before: SILER, CLAY, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Columbus.

Filed: September 23, 2016

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

APPENDIX B

2016 WL 3542450
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

Ohio A. Phillip Randolph Institute, et al.,
Plaintiffs,

v.

Jon Husted, Ohio Secretary of State, Defendant.

Case No. 2:16-cv-303

Filed 06/29/2016

ORDER

GEORGE C. SMITH, JUDGE

*1 This matter is before the Court on Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction (Doc. 39), and the parties' cross-merits briefing[1] (Docs. 38, 49, 52, 56, and 57); as well as the

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[1] The parties initially agreed during a scheduling conference before Magistrate Judge Deavers that there were no factual issues to be tried and that this case could be resolved on cross-merits briefing. (*See* Doc. 25, Tr. of Conf.). There was some confusion by the parties as to what to label the merits briefing and Plaintiffs therefore titled their initial brief as a Motion for Summary Judgment and Permanent Injunction, or, in the alternative a Motion for Preliminary Injunction. Despite the earlier discussions and request for an expedited resolution of the case, Plaintiffs now request that if their current motion is denied, that the case should be set for trial. (Doc. 57, Pls.' Reply, 29 ("However, if this Court disagrees and believes that

Amicus Curiae Briefs filed by the Public Interest Legal Foundation (Doc. 60) and Judicial Watch, Inc. (Doc. 61).[2] The parties agree that all the necessary facts and legal arguments have been presented to the Court and this action is ripe for adjudication. After careful review of the parties' arguments, the Court finds in favor of Defendant and **DENIES** Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or, in the alternative, Preliminary Injunction.

I. BACKGROUND

Plaintiffs Ohio A. Philip Randolph Institute ("Randolph Institute") and the Northeast Ohio Coalition for the Homeless ("NEOCH") initiated this case seeking injunctive relief to prevent future removal of registered voters from the voter registration rolls pursuant to, *inter alia*, Ohio Secretary of State Directive 2015-15. Plaintiff Randolph Institute is a state chapter of the A. Philip Randolph Institute, a national organization for African-American trade unionists and community activists that was established in 1965 to forge an alliance between the civil rights and labor

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there *are* genuine issues of material fact, Plaintiffs respectfully request an expeditious trial to resolve any genuine issues of material fact, and entry of a preliminary injunction in the interim period.")). The Court agrees with the parties' initial assessment of this case that the issues are purely legal and can be resolved on the briefs. Therefore, to expedite this matter as requested by both parties and because all issues have been fully briefed, the Court will rule on the permanent injunction and enter final judgment.

[2] Both Amicus Curiae briefs support Defendant's position in this case.

movements. Randolph Institute is a senior constituency group of the American Federal of the Labor and Congress of Industrial Organizations ("AFL-CIO"). Randolph Institute devotes most of its time and resources to voter education, registration, and outreach efforts. (Doc. 37, Am. Compl., ¶ 12). Plaintiff NEOCH is a nonprofit charitable organization who helps homeless and at-risk men, women, and children in the city of Cleveland by ensuring they have access to services, health screenings, legal assistance, and ensuring that every homeless person is provided the opportunity to vote and participate in the democratic process. (*Id.* at ¶ 15).

*2 Plaintiff Larry Harmon is a 59 year-old U.S. Navy veteran who has resided at the same address in Portage County, Ohio for approximately 15 years. Mr. Harmon voted in the 2004 and 2008 Presidential elections, but did not vote, or engage in any voter activity, from 2009 through 2015. In November 2015, Mr. Harmon went to the polls on Election Day to vote, but was told that his name did not appear in the poll book. In fact, Mr. Harmon had been removed from the Portage County voter registration rolls pursuant to Ohio's current practices and procedures for maintaining accurate voter rolls. The propriety of these practices and procedures serve as the focal point of this litigation. Mr. Harmon does not recall receiving a confirmation notice to confirm his voter registration.

Defendant Ohio Secretary of State, Jon Husted ("Secretary Husted") is Ohio's chief election officer and is charged with management of voter registration and election administration throughout

the state. *See* Ohio Rev. Code § 3501.04. Ohio law requires the Secretary of State to adopt "[a] process for the removal of voters who have changed residence," which is required to use information from the U.S. Postal Service's National Change of Address program (the "Ohio NCOA Process"). Ohio Rev. Code §§ 3501.05(Q); 3503.21. In addition to the Ohio NCOA Process, Ohio also uses a supplemental process to combat voter roll inaccuracies brought about by the frequent occurrence of voters changing addresses without notifying the United States Postal Service (the "Ohio Supplemental Process"). Once a voter is identified under either process, a confirmation notice is sent to the voter. A voter's failure to respond to the confirmation notice can ultimately lead to their registration being cancelled. The difference between the two processes is how a voter is identified to receive a confirmation notice. Under the Ohio NCOA Process, the United States Postal Service's program indicates that a voter has a forwarding address on file. Under the Ohio Supplemental Process, a voter is notified following a two-year period of non-voting. Here, Plaintiffs challenge the Ohio Supplemental Process as a violation of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 *et seq*. Section 8 of the NVRA establishes the requirements that states must follow to maintain their respective voter registration rolls. 52 U.S.C. § 20507.

A. History of Ohio's Voter Registration Roll Maintenance

Prior to the enactment of the NVRA, Ohio updated its voter registration roll pursuant to Article V, § 1 of the Ohio Constitution, which stated in part,

"[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote." Ohio Const. art. V, § 1.1. In 1993, Congress passed the NVRA "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" while "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(1), (4). Among other requirements, the NVRA requires states to "make a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... a change in the residence of the registrant[.]" 52 U.S.C. § 20507(a)(4)(B).

Following the enactment of the NVRA, the 120th Ohio General Assembly passed Amended Substitute Senate Bill No. 300 (effective January 1, 1995) and eliminated the statutory language that required boards of election to cancel voters solely because of their inactivity. Since 1994, Ohio has used two different processes to make a reasonable effort to maintain the accuracy of its voter registration rolls. Ohio implemented its current procedures to comply with and mirror the procedures established by the NVRA. The December 9, 1994 Directive from Ohio's Secretary of State outlining Ohio's new voter registration maintenance procedures began with the following:

> *3 This Directive prescribes programs and procedures to identify and cancel the voter registrations of ineligible persons in accordance with Am. Sub. S.B. 300, effective January 1, 1995 and the National Voter Registration Act of 1993

> (NVRA). Am Sub. S.B. 300 enacts new revised code sections 3503.19 and 3503.21, and amends current revised code sections 3501.01, 3501.05, 3501.11, 3503.18, and 3503.24 relating to the cancellation of ineligible voters.
>
> My goal in adopting these programs and procedures is to provide all boards of elections with workable, cost effective methods to remove ineligible persons from the voter registration rolls in accordance with the new requirements of state and federal law.

(Doc. 38-1, Ohio Secretary of State Directive 94-36).

B. Ohio's Voter Registration Roll Maintenance Procedures

Ohio currently utilizes two procedures to maintain the accuracy of its voter registration rolls: the Ohio NCOA Process and the Ohio Supplemental Process. *See* Ohio Rev. Code § 3503.21.

1. Ohio NCOA Process

The Ohio NCOA Process is conducted on an annual basis. Under the Ohio NCOA Process, the Secretary of State's Office compares "the records in the Statewide Voter Registration Database ("SWVRD") to the NCOA database." (Doc. 38-2, Damschroder Decl., ¶ 11). "The NCOA database contains names and addresses of individuals who have filed changes of address with the United States Postal Service ("USPS")." (*Id.*). During the Ohio NCOA Process, the Secretary "provides the boards with a file listing the possible voter matches to the NCOA file." (*Id.*). The boards of elections compare the county file to the NCOA file and then "send a confirmation notice (Form 10-S) to each elector

identified." (*Id.* at ¶¶ 11, 17). The confirmation notice is a postage pre-paid forwardable form that a voter can return to indicate whether the voter still resides at the same location. (*Id.*).

In December 2013, an amendment by the General Assembly to Senate Bill 200 required the Ohio Secretary of State to conduct the Ohio NCOA Process on an annual, rather than a biennial, basis. At that time, the Secretary also moved the corresponding Ohio Supplemental process to an annual basis. (*Id.* at ¶ 9).[3]

Pursuant to the Ohio NCOA Process, an individual's voter registration is cancelled when he or she: (1) appears on the list of individuals who have filed a change of address with the USPS and a different address appears for that individual in the SWVRD; (2) fails to respond to the confirmation notice sent by forwardable mail with a pre-paid return form; and (3) then fails to engage in any voter activity for a period of four consecutive years, including two federal general elections (one being a presidential general election) from the date that the confirmation card is mailed. (*Id.* at ¶ 21).

2. Ohio Supplemental Process

The Ohio Supplemental Process begins after the Ohio NCOA Process is completed and "seeks to

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[3] The Secretary of State maintains that Ohio is also obligated to perform both processes on an annual basis pursuant to a Settlement Agreement that ended prior litigation. *See Judicial Watch v. Husted*, Case No.: 12-cv-792 (Sargus, J.) (hereinafter, the *Judicial Watch* case). A copy of the Settlement Agreement was filed as Doc. 38-4, Exhibit D to Defendant's Initial Brief.

identify electros whose lack of voter activity indicates they may have moved, even though their names did not appear on the NCOA generated list." (Doc. 38-7, Ex. G to Def.'s 1st. Br., Ohio Secretary of State Directive 2009-05; *see also* Doc. 38-2, Damschroder Decl., ¶ 14). As part of the Ohio Supplemental Process, "BOEs use data points (e.g., voting history) to compile the data for the supplemental process." (Doc. 38-2, Damschroder Decl., ¶ 14). In the Ohio Supplemental Process, each individual board of elections compiles its own list of individuals who, according to the board's records, have not engaged in any voter activity for two years.[4] (*Id.* at ¶ 15). The boards of elections send each such individual identified a confirmation notice by forwardable mail with a postage pre-paid return envelope. (*Id.*). An individual who receives a confirmation notice and needs to update his or her address may do so using the State's online change of address system. (*Id.* at ¶ 19). Secretary Husted implemented this online change of address system in 2012. (*Id.*). An individual receiving a confirmation notice may also return the postage pre-paid form free of cost through the mail. If the individual returns the confirmation notice and provides a new address, the individual's registration record is updated by the appropriate

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[4] Voter activity includes: "a voter completing the confirmation card and returning it; filing a change of address either through BMV or one of the other designated agencies; filing a voter registration card with the board of elections; ... casting an absentee ballot; casting a provisional ballot; voting on election day." (Doc. 42-1, Damschroder Dep. 66:19-67:5). Boards also have discretion to consider whether signing a candidate, issue, or local option petition is viewed as voter activity. (*Id.* at 70:17-20; 130:9-14).

board of elections with the new address. (*Id.* at ¶ 20). If the individual returns the confirmation notice confirming that his or her current address is still accurate, the board notes on the individual's registration record that the confirmation notice was returned to the board and the address was confirmed. (*Id.*).

*4 If an individual fails to return the confirmation notice, fails to update his or her voter registration, and fails to engage in any other voter activity, the individual will be marked as "inactive" in the registration database. (*Id.*). This "inactive" individual has all the rights of an otherwise qualified elector, including the ability to cast a regular ballot at any election. (*Id.*). If, however, four years (including two federal general elections) passes without voter activity, at that time the individual's voter registration record is cancelled. (*Id.*).

Plaintiffs allege that thousands of Ohio voters, like Plaintiff Mr. Harmon, have been removed from the voter registration rolls pursuant to the Ohio Supplemental Process. Plaintiffs assert that "[i]n Cuyahoga, Greene, Hamilton, and Medina Counties, for example, nearly 70,000 voters were purged in 2015 pursuant to the [Ohio] Supplemental Process, with no indication that any of them had actually moved." (Doc. 37, Am. Compl., ¶ 46). Plaintiffs state that "the [Ohio] Supplemental Process disproportionately burdens Ohio's most vulnerable and marginalized citizens. In Cuyahoga County, for example, the purged voters disproportionately reside in communities of color and low-income communities." (*Id.* at ¶ 48).

On December 17, 2015, Plaintiff Randolph Institute, through its counsel, sent a certified letter and email to Defendant Husted, notifying him that the State of Ohio was not meeting its obligations under Section 8 of the NVRA. On February 23, 2016, Plaintiff NEOCH, through its counsel, notified Defendant Husted of the alleged violations and both letters provided notice of their intent to sue for violations of Section 8 of the NVRA. Plaintiffs then initiated this case on April 6, 2016.

II. STANDARD OF REVIEW

Plaintiffs initially filed this case and immediately moved for a Temporary Restraining Order and Preliminary Injunction., and they are now seeking a permanent injunction. The "standard for granting a permanent injunction is essentially the same as the standard for a preliminary injunction." *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1147 (S.D. Ohio 2000) (Smith, J.). However, when a plaintiff seeks a permanent injunction, the plaintiff must show actual success on the merits, rather than a mere likelihood of success on the merits. *Id.*, (citing *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546, n. 12 (1987)). In the Sixth Circuit, it is well-settled that the following factors are to be considered in determining whether injunctive relief is necessary:

> (1) Whether the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the movant has shown irreparable injury; (3) whether the issuance of a preliminary [permanent] injunction would cause substantial harm to others; and (4) whether the

public interest would be served by granting injunctive relief.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000) (citing *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*)). These four considerations are not required elements of a conjunctive test, but are rather factors to be balanced. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (finding that no single factor is determinative).

The decision whether or not to issue injunctive relief falls within the sound discretion of the district court. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). A permanent injunction shall only be ordered upon showing (1) "that [plaintiff] has suffered irreparable injury;" (2) "there is no adequate remedy at law;" (3) "'that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted;'" and (4) "it is in the public's interest to issue the injunction." *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (quoting *eBay Inc., et al. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Moreover, Plaintiffs must establish their case by clear and convincing evidence. *Damon's Rests., Inc. v. Eileen K. Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio Aug. 30, 2006) (King, M.J.). To meet this burden, the movant's evidence "must more than outweigh the [opposing] evidence," but must also "persuade the court that its claims are highly probable." *Id.*

III. DISCUSSION

*5 Plaintiffs have alleged four violations of Section 8 of the NVRA of 1993: (1) that the Ohio Supplemental Process violates the NVRA by

removing voters from the voter registration rolls based on their failure to vote; (2) Ohio's voter maintenance procedures are unreasonable; (3) Ohio's voter maintenance procedures are not conducted uniformly; and (4) the confirmation notice is legally deficient. Defendant, on the other hand, asserts that the Ohio Supplemental Process does not remove a voter solely for not voting and Ohio's processes for maintaining the voter registration rolls are specifically outlined and authorized by the plain language of the NVRA. This Court will consider the parties' arguments on each of the alleged violations in turn.

A. Success on the Merits

1. National Voter Registration Act

There is no dispute that federal law requires states to implement procedures to maintain voter registration rolls. Specifically, the two applicable statutes are the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA"). Plaintiffs allege that Defendant's use of the Ohio Supplemental Process "has violated and continues to violate Section 8 of the NVRA by removing voters based on a failure to vote and without following the procedures required by the NVRA for removing voters who have changed residence. 52 U.S.C.A. § 20507." (Doc. 37, Am. Compl., ¶ 56).

Notably, both sides argue that the language of the NVRA is unambiguous. "If the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced." *United States v. Plavcak*, 411 F.3d 655, 661 (6th Cir. 2005). Despite both parties arguing in favor of a

plain-meaning interpretation, they each reference the legislative history of the NVRA, citing selective quotes in support of their respective positions. (*See* Doc. 39, Pls.' Mot., 23; Doc. 52, Pls.' Opp. Br., 11–12; Doc. 49, Def.'s 2d Br., 8–9). It is well-settled that if a statute lacks ambiguity, then "there is no need to consult legislative history." *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002). Similarly, Plaintiffs' reliance on the Department of Justice's interpretations of the NVRA is misplaced because the Court need not consider those interpretations where the NVRA is clear on its face.

The NVRA, 52 U.S.C. § 20507, titled "Requirements with respect to administration of voter registration," specifically provides:

> **(b)** Confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office –
>
> > **(1)** shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (*42 U.S.C. 1973* et seq. [*52 USCS §§ 10301* et seq.]); and
> >
> > **(2)** shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs.

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which—

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

*6 **(B)** if it appears from information provided by the Postal Service that—

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in

subsection (d)(2) to confirm the change of address.

(2) (A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systemically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude—

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this Act.

(d) Removal of names from voting rolls.

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant—

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)

(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election

during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the

> registrant can continue to be eligible to vote.
>
> **(3)** A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

52 U.S.C. § 20507(b)-(d).

Plaintiffs assert that the plain language of the NVRA, as set forth above, prohibits voter list-maintenance procedures that "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reasons of the person's failure to vote . . . ." 52 U.S.C. § 20507(b)(2). Plaintiffs seemingly ignore the rest of that clause, which is separated by a comma and provides exceptions that allow for the procedures specifically described in both subsections (c) and (d). Rather, Plaintiffs argue that subsections (c) and (d) are essentially just one exception that should be considered together as part of the address-change confirmation procedure. (Doc. 57, Pls.' Reply, 4–5). As such, Plaintiffs urge the Court to interpret the NVRA as a mandate that voter inactivity can only be considered after the confirmation notice is sent and cannot be used as the trigger for initiating the address-confirmation process.

Plaintiffs accuse Defendant of "cherry-picking one of [the NVRA] exceptions and treating it as though it were the basic rule—contrary to the statute's actual words—[which] is not a "plain-meaning" interpretation." (*Id.* at 6 (citing *United States v. Medlock*, 792 F.3d 700, 709 (6th Cir. 2015) ("[I]t is a 'cardinal principle of statutory construction that

courts must give effect, if possible, to every clause and word of a statute.' " (quoting *Williams v. Taylor*, 529 U.S. 362, 364 (2000)))))). In reality, it is Plaintiffs who focus on a single clause in Section 20507(b)(2) and not the entirety of the statute.

Further, Plaintiffs want the Court to read requirements and language into the NVRA that simply are not there. Plaintiffs argue that Ohio may only send a confirmation notice to a voter "to confirm a change of residence after the state has already obtained reliable second-hand information, independent of the voter's failure to vote, indicating that a voter has moved." (Doc. 39, Pls.' Mot., 26). Plaintiffs continue, "[a]llowing states to *initiate* the voter-removal process based on a failure to vote—as Ohio is now doing—would eviscerate subsection (b)'s plain language, allowing the exception to swallow the rule." (*Id.* at 27). However, this is not what the NVRA states. The plain language of the NVRA contradicts Plaintiffs' position. The phrases Plaintiffs rely on, such as "reliable second-hand information," "independent of the voter's failure to vote," "initiate," "trigger," etc., are nowhere to be found in the NVRA. These are phrases that Plaintiffs would like the Court to write into the NVRA.

Subsection (d), set forth in detail above, is the basis for the Ohio Supplemental Process. This section does not specifically state who should be sent a confirmation notice or when that confirmation notice should be sent. Therefore, Defendant argues, and the Court agrees, that that decision is left to the states. *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) ("Our duty [is] to refrain from reading a

phrase into the statute when Congress has left it out."); *see also Bates v. U.S.*, 522 U.S. 23, 29 (1997) (courts "resist reading words or elements into a statute that do not appear on its face").

*8 In 2002, Congress addressed this section of the NVRA in HAVA, explaining:

> [C]onsistent with the National Voter Registration Act of 1993 ..., registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed ***solely*** by reasons of a failure to vote.

52 U.S.C. § 21083(a)(4) (emphasis added). The Ohio Supplemental Process is consistent with both the NVRA and HAVA as voters are never removed from the voter registration rolls ***solely*** for failure to vote. Pursuant to the Ohio Supplemental Process, a confirmation notice is sent to voters who have been inactive for two years. If they do not respond to the confirmation notice, they are placed on an inactive list, but their ability to vote does not change at that time. If those on the inactive list then fail to vote in the next two general federal elections, one of which is a Presidential election, then those voters are removed from the voter registration rolls. Therefore, it is only after a person ***both*** (1) fails to respond to the confirmation process, ***and*** (2) subsequently fails to vote in the following two general federal elections that he or she is removed from the voter registration rolls. As Amicus Judicial Watch aptly describes the process, "registrants are *queried* on the basis of their failure to vote, but not *removed* on that basis." (Doc.

61, Judicial Watch Amicus Br., 7 (emphasis in original)). The NVRA does not mention— explicitly or implicitly—the events that need or need not happen before a state may initiate its confirmation process. For instance, as applicable here, the NVRA does not prohibit a state from sending a confirmation notice to voters who have not voted for a certain period of time. Using the discretion left to the states, they have undertaken different ways of beginning the list maintenance process.[5] *See* 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.").

While there is a general lack of actual case law analyzing Section 8 of the NVRA, it bears mentioning that both parties have cited several cases in which the statute has been litigated and resolved without a final court order. Namely, Indiana entered into a consent decree with the DOJ in 2006 whereby the State would engage in a process that is more extensive than that employed in Ohio. *See U.S. v. Indiana*, 1:06-cv-1000-RLY-TAB (S.D. Ind. 2006). In addition, the City of Philadelphia reached a settlement agreement with the DOJ in 2007 whereby the City would consider voter inactivity as part of its voter roll maintenance process. *See U.S. v. City of Philadelphia and Philadelphia City Commission*, C.A. No. 06-4592 (E.D. Pa 2007). In addition, as noted above in footnote 3, this Court oversaw a settlement agreement reached by Defendant Husted and Judicial Watch in 2014. (*See* Doc. 38-4, *Judicial*

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[5] Others states use inactivity to begin their list maintenance processes, including Missouri, Tennessee, Georgia, West Virginia, Montana, and Florida.

Watch v. Husted Consent Decree.) That agreement is still in effect and sets forth Defendant Husted's obligations with respect to Ohio's voter registration maintenance processes. These agreements are not controlling in the instant matter, but they do lend credence to the fact that Ohio's voter roll maintenance processes comport with the NVRA's requirements.

*9 Accordingly, the Court finds that the Ohio Supplemental Process does not violate the NVRA, and in fact, the unambiguous text of the NVRA specifically permits the Ohio Supplemental Process.

2. Reasonableness

Plaintiffs argue that the Ohio Supplemental Process violates the NVRA because it is "unreasonable" in violation of 52 U.S.C. § 20507(a)(4)(B). Plaintiffs argue that because the Ohio Supplemental Process does not reliably identify whether a voter has moved, it is not a reasonable method for purging the voter rolls and thus, it violates the NVRA. Plaintiffs ask the Court to adopt the definition of "reasonable" provided by the Department of Justice as "based upon objective and reliable information of potential ineligibility due to a change of residence that is independent of the registrant's voting history." (Doc. 39, Pls.' Mot., 30 (quoting *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. May 4, 2016), ECF No. 19)). Defendant argues that the statute does not "create some nebulous reasonableness standard." (Doc. 49, Def.'s 2d Br., 10).

Plaintiffs argue that the NVRA requires that the Ohio Supplemental Process must be reasonable

under 52 U.S.C. § 20507(a)(4)(B), but the language in the statute does not contain such a requirement. The statute specifically provides:

> **(a)** In general. In the administration of voter registration for election for Federal office, each State shall—
>
> * * *
>
> **(4)** conduct a general program that makes a ***reasonable*** effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—
>
> **(A)** the death of the registrant; or
>
> **(B)** a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

52 U.S.C. § 20507(a)(4)(B) (emphasis added). The language of the statute is clear that the "program" shall be "general" and the "effort" shall be "reasonable." Notably, the statute does not say that the "program" must be "reasonable." Further bolstering this conclusion is that the statute sets forth a specific set of requirements for programs used to remove voters who have moved. The statute requires that such a program be completed "in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). Again, it does not say that such a program needs to be reasonable nor is such a requirement contained within subsections (b), (c), or (d). The Court need not consider outside sources for the interpretation of the statute when the statute is clear on its face. *Detroit Receiving Hosp. & Univ. Health Ctr. v. Sebelius*, 575 F.3d 609, 613 (6th Cir. 2009) ("Our analysis begins and ends with the

statute, because the provisions at issue are clear.") (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Accordingly, the Court finds that there is no reasonableness requirement for programs that are otherwise lawful under subsections (b), (c), and (d).

However, even if the Court were to accept that the NVRA requires Defendant Husted to use reasonable means to purge the voter rolls, Plaintiffs' only case source for what should be considered reasonable is *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001). Plaintiffs argue "[i]f a state chooses to use another source of change-of-address information instead of or in addition to NCOA, that source must be similarly reliable." (Doc. 39, Pls.' Mot., 31). Plaintiffs rely on dicta from *Welker* for this conclusion, quoting that "the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using *reliable* information from *government agencies* such as the Postal Service's change of address records." (*Id.*, emphasis added by Pls. (quoting *Welker*, 239 F.3d at 599)). Plaintiffs take the language in *Welker* one step further by asking this Court to determine that based on *dicta* from *Welker*, a state must use information that reliably indicates a voter has moved. The *Welker* Court made no such holding and the Court will not add language to the *Welker* decision. In actuality, the Ohio Supplemental Process uses information that is both reliable and comes from a government agency. A voter's non-participation in an election may not be an ideal indicator of whether a voter has moved, but Plaintiffs cannot dispute that the information itself—that the

voter did not participate in an election—is reliable and comes from a government agency. In the Court's view, the *dicta* in *Welker* requires nothing more. Accordingly, Plaintiffs' argument that the Ohio Supplemental Process is unreasonable is without merit.

3. Uniform Implementation

***10** Next, Plaintiffs allege that the Ohio Supplemental Process violates the NVRA because it is applied in a non-uniform manner. Plaintiffs argue that counties conduct the process at different times, that counties can chose whether voter activity includes certain actions, and that the notices sent by each county are different. Defendant argues that Plaintiffs do not have standing to raise this argument because Plaintiffs failed to provide pre-litigation notice of the claim as required by the NVRA. Further, Defendant asserts that even if Plaintiffs have standing, the Ohio Supplemental Process is uniform and nondiscriminatory. To reach the merits of this claim, the Court will assume *arguendo* that Plaintiffs do have standing.

The "uniform and nondiscriminatory languages arises under 52 U.S.C. § 20507(b)(1) which requires that any program which protects the integrity of the voting process "shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." Plaintiffs argue that a voter's county determines if and when a voter is removed from the rolls while Defendant argues that all of Ohio's 88 counties have the same 120-day window in which to purge their rolls and that each county has the discretion to determine which activities constitute "voter activity." Plaintiffs make no argument that

the differences between counties are discriminatory, instead, Plaintiffs argue that the differences improperly lack uniformity.

Plaintiffs ask the Court to adopt the following standard: "To be uniform and non-discriminatory, a state's list-maintenance program must not treat similarly situated voters differently based on irrelevant characteristics." (Doc. 39, Pls.' Mot., 22 (citing *Project Voter v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006)). But the county in which one resides is not an irrelevant characteristic in Ohio. Ohio's voting system delegates significant authority to the county boards of elections. Counties are responsible for generating ballots, delivering ballots, the selection and maintenance of voting equipment, determining whether certain petitions are needed, and for administering the actual election on Election Day. Ohio Rev. Code §§ 3501.06; 3501.11; 3506.02; 3506.03; 3513.051. Further, a person's physical location is of course determinative of which issues and candidates on which a person may vote. Ohio Rev. Code §§ 3503.06, 3503.07, 3503.17. In fact, county boards of elections in Ohio are specifically granted the responsibility of establishing, defining, rearranging, and combining election precincts. Ohio Rev. Code §§ 3501.11(A). There are numerous reasons why a county may operate a voter-maintenance program differently from a neighboring county including, but not limited to the county budget, the county population, and county access to data. In Ohio, the county in which one resides is anything but an irrelevant characteristic. Accordingly, under Plaintiffs' test, there is uniformity and non-discrimination because

the Court cannot find that voters in different counties are similarly situated.

However, even if the Court were to find the process non-uniform, the Ohio Supplemental Process is otherwise lawful, meaning that those who did not get to vote because they were purged before the election were properly purged. Accordingly, the effective disparity is not that some voters were purged wrongfully, but rather, that some voters improperly remained on the rolls and should not have had the right to vote. Notably, HAVA requires that "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office **shall be removed** from the official list of eligible voters . . . ." 52 U.S.C. § 21083(a)(4). But even if Defendant is in violation of HAVA for not removing voters who should be purged, Plaintiffs' Amended Complaint does not ask this Court to address those who should not have been able to vote, but rather to restore those "unlawfully purged." (*See* Doc. 37, Am. Compl., ¶¶ 58, 62-63(ii)). As set forth, Plaintiffs' Amended Complaint does not seek any relief for an Ohio Supplemental Process which improperly allows some to vote. Finally, although it appears the timing of the Ohio Supplemental Process could be more narrowly tailored, the Court cannot find a 120-day period for voter-roll-maintenance non-uniform where the Ohio Supplemental Process uniformly removes voters who have no voter activity and fail to respond to a confirmation notice in accordance with the NVRA. Accordingly, Plaintiffs' claim fails on the merits.

4. Confirmation Notice

*11 Plaintiffs argue that the version of Ohio's Confirmation Notice in place at the time this litigation began violates the requirements of Section 8(d) of the NVRA. Specifically, Plaintiffs argue that the Confirmation Notice does not notify voters of the date by which they must respond to avoid adverse consequences; it fails to inform voters of the consequences of not responding to the confirmation notice; it does not inform people who have moved out of the state how they can register in their new state; and it requires voters to provide the same information required to register to vote. Plaintiffs have sought injunctive relief "directing the Defendant to adopt a new Form 10-S that complies with the requirement of the NVRA. The NVRA specifically provides:

> **(2)** A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:
>
> > **(A)** If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for

> Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.
>
> **(B)** If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

52 U.S.C. § 20507(d)(2).

After Plaintiffs brought this issue to the attention of the Secretary of State, he has made changes to Form 10-S so that it is now in compliance with the requirements of the NVRA. (*See* Doc. 38-18, Ex. Q to Def.'s 1st Br., (the "Revised Notice")). The Revised Notice has been promulgated by Secretary Husted in the form of emails to each of Ohio's county boards of elections and it is posted on the Secretary of State's website. (*See* Doc. 56-2, Ex. B to Def.'s 3d Br., Website Screen Shots and Emails). Defendant represents that the Revised Notice will be used in the 2016 list maintenance procedure. Defendant asserts that as a government official, his change in the procedure is entitled to deference, relying on *Mosley v. Harrison*, 920 F.2d 409, 415 (6th Cir. 1990) (holding that, in the context of mootness, a change in procedure made by a public official is entitled to greater deference than a change by a private entity). Defendant therefore argues that Count II of Plaintiffs' Amended Complaint is now moot.

Plaintiffs dispute that their claim is now moot on the basis that the old Form 10-S was in existence at the time the Complaint was filed. For voluntary

cessation to render a claim moot, "there [must be] no reasonable expectation that the wrong will be repeated." *Youngstown Publ'g Co. v. McKelvey*, 189 Fed. Appx. 402, 405 (6th Cir. 2006). Plaintiffs argue that even if the Revised Notice is adopted and used in the 2016 process, there is nothing preventing the Defendant from reverting back to the non-conforming Confirmation Notice in the future except court intervention. The Court does not agree. Defendant voluntarily made changes to Form 10-S upon receiving notice from Plaintiffs that it was not in compliance with the NVRA. Defendant has disseminated the Revised Notice and has stated as part of the record that the State plans to use this notice in the annual execution of the list maintenance procedures. There is no evidence to suggest that the Defendant does not plan to use this Revised Notice in 2016 or at any other point in the future.

*12 Finally, Plaintiffs argue that problems persist with the Revised Notice despite Secretary Husted's revisions. Specifically, Plaintiffs argue that the Revised Notice violates the NVRA because it fails to provide information about how a recipient can re-register if he/she has moved outside the state. (Doc. 57, Pls.' Reply, 20). Section (d)(2)(B) of the NVRA provides: "If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote." 52 U.S.C. § 20507(d)(2)(B).

Plaintiffs have raised this argument for the first time in their Reply brief despite being aware—prior to filing their Response—of the Revised Notice and

Defendant's position that the Revised Notice complied with the NVRA notice requirements. It is not proper for a party to raise a new argument in reply because the opposing party is not afforded with an opportunity to respond. As such, the Court is free to disregard this argument. *See Ross v. Choice Hotels Int'l, Inc.*, 882 F. Supp. 2d 951, 958 (S.D. Ohio 2012) (Frost, J.) ("This Court has explained time and again that 'a reply brief is not the proper place to raise an issue for the first time.' Consequently, the Court need not and will not consider [the new argument]." (citations omitted)).

Even if the argument were timely raised, it still fails. The NVRA does not specifically require states to control and/or instruct voters in other states. Section 20507 begins with "Each State shall . . . ." The protections of the NVRA exist to protect voters in their respective states to *continue* to vote within that State—not register in another state. It defies logic that the NVRA would saddle the various secretaries of state (or their equivalents) with the onerous burden of coaching out-of-state residents through the registration process in their new states of residence. The Revised Notice gives *Ohio voters*—the only voters Ohio is obligated to provide notice to—several options to notify the Secretary of State of a change of address, including the opportunity to update the information online. Accordingly, the Revised Notice, Form 10-S, is therefore in compliance with the NVRA.

B. Irreparable Harm/Injury

Given that Plaintiffs have not substantially demonstrated a violation of the NVRA, the Court is unable to conclude that irreparable harm has been

established for purposes of issuing a preliminary and/or permanent injunction.

C. Harm to Others

Again, since there has been no violation of the NVRA, there will be no harm to others in continuing to maintain the voter registration rolls in accordance with the NVRA.

D. Public Interest

The Court finds that the public interest is being served by Ohio's voter maintenance procedures and will continue to be served as long as Ohio continues to operate in compliance with the NVRA. The purposes of the NVRA include: "to protect the integrity of the electoral process;" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501. Therefore, Ohio's procedures of maintaining the voter registration rolls ensure the integrity of the election process.

Accordingly, after examining the preliminary and permanent injunction factors together, the Court concludes that injunctive relief is not warranted in this instance. This decision disposes of all of Plaintiff's claims and effectuates the desire of the parties—that is, it renders the Court's final decision on the merits of the case. The parties have agreed that a final, expedient decision is in the best interest of all involved in light of the looming November election. The Court believes this order provides exactly that.

IV. CONCLUSION

*13 Based on the foregoing, Plaintiffs' Motion for Summary Judgment and Permanent Injunction, or,

in the alternative, Preliminary Injunction is DENIED. Having found that Plaintiffs' claims are not meritorious, there is no just reason to delay and therefore, final judgment shall be entered in favor of Defendant.

The Clerk of this Court shall remove Documents 9 and 39 from the Court's pending motions list and terminate this case.

IT IS SO ORDERED.

APPENDIX C

2016 WL 6093371
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Eastern Division.

Ohio A. Phillip Randolph Institute, et al.,
Plaintiffs,

v.

Jon Husted, Ohio Secretary of State, Defendant.

Case No. 2:16-cv-303

Filed 10/19/2016

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OPINION AND ORDER

GEORGE C. SMITH, JUDGE

*1 This matter is before the Court on Defendant's Motion to Implement Remedy (Doc. 72) and Plaintiffs' Motion for Temporary Restraining Order

and Motion for an Order to Show Cause (Doc. 74). The Court ordered expedited briefing on the Motions and they are now ripe for review.[1] After careful review of the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** both Defendant's Motion to Implement Remedy and Plaintiffs' Motion for Temporary Restraining Order.

I. BACKGROUND

The Court has previously set forth the background in this case in detail in its June 29, 2016 Opinion and Order on the merits briefing. (*See* Doc. 66). At issue in this case is a challenge to Ohio's Supplemental process, which has been used by Jon Husted, the Ohio Secretary of State ("Secretary Husted" or the "Secretary of State") as a supplement to the National Change of Address program ("NCOA"), targeting voters who changed addresses but failed to notify the United States Postal Service. Plaintiffs challenged the Ohio Supplemental Process as a violation of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 *et seq*. This Court held that the Ohio Supplemental Process did not violate the National Voter Registration Act. (*See* Doc. 66, Opinion and Order). However, the Sixth Circuit reversed and remanded this Court's decision, finding that the Ohio Supplemental Process is illegal under the NVRA. *A. Philip Randolph Institute v. Jon*

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[1] Amicus, the Ohio Democratic Party, and interested party, the United States, have both filed briefs regarding their opinions of the appropriate remedy in this case. The briefs suggest that the relief sought by the parties is not sufficient and the Court should reinstate all voters who have ever been removed pursuant to Ohio's Supplemental Process.

Husted, ___ F.3d ___, 2016 WL 5328160, at *8 (6th Cir. Sept. 23, 2016).

In an attempt to comply with the Sixth Circuit decision, the Secretary of State filed a Motion to Implement Remedy which includes a proposed Directive setting forth the process that Defendant believes reflects the remedy Plaintiffs sought in their Complaint and allows individuals removed from the registration roll through the 2015 Supplemental Process to vote assuming certain qualifications are met. Plaintiffs have also moved this Court for a Second Temporary Restraining Order requesting the Court order the Secretary of State to issue a Directive to count all provisional ballots cast in the 2016 General Election by voters whose registrations were cancelled pursuant to Ohio's Supplemental Process in 2011, 2013, or 2015. (Doc. 74, TRO at 2). Plaintiffs also request immediate relief to ensure that absentee ballot requests by voters purged pursuant to Ohio's Supplemental Process are not rejected.

II. STANDARD OF REVIEW

Rule 65(b) of the Federal Rules of Civil Procedure permits a party to seek injunctive relief to prevent immediate and irreparable injury. A temporary restraining order is an extraordinary remedy whose purpose is to preserve the status quo. *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996). The burden of proving that the circumstances "clearly demand" such an extraordinary remedy is a heavy one: "[t]he party seeking the injunction must establish its case by clear and convincing evidence." *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566,

573 (6th Cir. 2002); *Honeywell v. Brewer-Garrett Co.*, 145 F.3d 1331 (6th Cir. 1998).

***2** The factors considered in granting a temporary restraining order or a preliminary injunction are similar in nature. In the Sixth Circuit, it is well-settled that the following factors are to be considered in determining whether a temporary restraining order is necessary:

> (1) whether the movant has a strong or substantial likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the relief requested; (3) whether issuance of the injunction will cause substantial harm to others; and (4) whether the public interest will be served by issuance of the injunction.

Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 432 (6th Cir. 2004). The factors are not prerequisites; rather, they must be balanced. *Capobianco, D.C. v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004); *see also Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (no single factor is determinative). The decision whether or not to issue a preliminary injunction falls within the sound discretion of the district court. *See Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982).

III. DISCUSSION

As set forth above, the Sixth Circuit held, without qualification, that "Ohio's Supplemental Process violates Section 8, subsection (b)(2) of the NVRA." *A. Philip Randolph Institute v. Jon Husted*, ___ F.3d ____, 2016 WL 5328160, at *8 (6th Cir. Sept. 23,

2016). Therefore, the Sixth Circuit remanded this case for further proceedings consistent with their opinion.

With the 2016 Election Day looming and early voting already underway, the Court finds itself in a difficult position. The Sixth Circuit's decision held that a process overseen for over 22 years by multiple Ohio Secretaries of State—from both major political parties—was unlawful. Now, with fewer than 20 days until the election, this Court is faced with the task of crafting and ordering the implementation of a remedy that restores the rights of as many disenfranchised voters as possible without placing an undue burden on election officials, fundamentally changing the State's voting processes, or making room for abuse of those same processes. Given the time constraints and complexity of the logistical hurdles now faced by Secretary Husted and Ohio's 88 county boards of elections, it is unlikely that any remedy will be perfect. That being said, the parties agree on several key issues and the Court is confident that there are additional, manageable remedial measures that state and county officials can undertake prior to the election. Despite the imperfect circumstances now faced by the parties and Ohio voters purged under Ohio's Supplemental Process, it is the Court's hope that the remedies detailed in this Opinion and Order will successfully restore the rights of many Ohio voters prior to the upcoming election.

The Secretary of State has ended the Supplemental Process and therefore going forward, is no longer in violation of the NVRA. Despite arguing that the Eleventh Amendment bars an

injunction against a state when there is no allegation of "an ongoing violation of federal law", the Secretary of State has still proposed a Directive that would allow unlawfully purged voters to vote in the 2016 General Election. (Doc. 80, Def.'s Mem. Opp. at 6, (citing *Deuel v. Dalton*, No. 3:11-cv-466, 2012 WL 1155208, *6 (M.D. Tenn. Apr. 4, 2012))). The Eleventh Amendment does not bar the relief sought in this case. Although Secretary Husted has stopped using the Ohio Supplemental Process going forward, the Sixth Circuit determined that the past use of the Ohio Supplemental Process was unlawful and that some qualified electors were illegally removed from the voter rolls. If those who were unlawfully removed from the voter rolls are not allowed to vote, then the Secretary of State is continuing to disenfranchise voters in violation of federal law. Under *Ex Parte Young*, the Court has the power to design a remedy that ends continuing violations of federal law in cases such as this. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123, 155–56 (1908)). Accordingly, at this stage, the Court finds that the Eleventh Amendment does not bar the relief sought in the TRO.

*3 The parties agree that Plaintiffs have succeeded on the merits of their NVRA claim and that voters were unlawfully removed from Ohio's voter registration rolls pursuant to Ohio's Supplemental Process, justifying the need for injunctive relief. Both parties have submitted their proposed remedies agreeing that immediate relief is required to ensure that voters who were unlawfully removed are permitted to vote in the 2016 General Election because voting is already underway; however, they disagree as to the scope of the relief.

There is no dispute that the remedy ordered by this Court will not involve the reinstatement of all voters who have been removed from the voter registration rolls.[2] But it will allow voters who have been illegally removed to cast a provisional ballot and the Court will set forth the procedure for validating and counting those provisional ballots. The following issues remain in dispute and will be addressed in turn.

A. Confirming Voters Removed from Ohio's Supplemental Process

The Secretary of State proposed the following relief:

> For purposes of the November 8, 2016 General Election . . . a provisional ballot cast during the in-person absentee voting period or on Election Day by a voter who is not registered to vote in the State of Ohio may be counted if all of the following apply:
>
> 1. The individual's voter registration was cancelled in 2015 (confirmation card mailed in 2011) pursuant to the Supplemental Process;
>
> 2. The voter's provisional ballot affirmation reflects the same address at which the voter was

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[2] The Ohio Democratic Party and the United States are seeking this exact relief. However, such broad reinstatement has not been requested as relief in this case and would be difficult to accomplish prior to the 2016 General Election, especially since early voting is already underway. Rather, the better way to ensure that any unlawfully removed voters are able to vote is to allow them to cast a provisional ballot that can be validated up to 30 days after the election.

last registered to vote in the State of Ohio at the time of cancellation;

3. The board of elections does not have information that the voter was deceased, incarcerated on a felony conviction, or adjudicated incompetent under Ohio law by a county probate court after the individual's registration record was cancelled; and,

4. The voter's provisional ballot affirmation form and the ballot otherwise comply with all applicable laws and directives.

(Doc. 72-1, Proposed Directive).

Plaintiffs propose that all voters purged pursuant to Ohio's Supplemental Process in 2011, 2013, and 2015, should be counted if the other conditions apply. Plaintiffs also provide more specific details with respect to condition three set forth above, which include:

> the individual does not appear on a list of (i) deceased voters provided by the state department of health or by the State and Territorial Exchange of Vital Events ("STEVE") database, (ii) individuals incarcerated on a felony conviction provided by an Ohio clerk of court or a federal district court, or (iii) voters adjudicated as incompetent under Ohio law by a county probate court, where the relevant event (i.e., death, incarceration, adjudication of incompetence) occurred after the individual's registration record was cancelled;

(Doc. 74-1, Proposed TRO at 5).

The Secretary of State responds that "Plaintiffs' demand would be burdensome and raises questions about reliability and uniformity." (Doc. 80, Def.'s Mem. Opp. at 15). Further, the Secretary of State submits declarations of election officials in support of his argument that some boards of elections' databases identify whether a name was removed from the registration roll under the Supplemental Process, while others do not. (*Id.* (citing Damschroder Dec. at ¶ 29; Shubat Dec. at ¶ 10)). For the boards of elections that do not have that capability, they can contact the Secretary of State who can compare the name against the state-wide NCOAs list from previous years, and if not on that list, the presumption would be that the name was removed pursuant to the Supplemental Process. Then, other checks would need to be performed to ensure the person is not deceased, incarcerated on a felony conviction, or ruled incompetent.[3]

*4 Additionally, the Secretary of State argues that the lists compiled prior to 2011 may be unreliable because they were prepared by previous administrations. Finally, the Secretary of State argues that extending the procedure of validating provisional ballots beyond those removed pursuant to Ohio's Supplemental Process in 2015,—*i.e.*, counting provisional ballots for those voters purged in 2013

---

[3] The Secretary of State makes an important point, that "[e]ven those counties that can identify whether a name was removed through the Supplemental Process will still need to do those verifications..." Because "once a name is removed from the registration roll, in most counties, lists are not updated with subsequent events such as death." (Doc. 80, Def.'s Memo. in Opp. at 23 (citing Damschroder Dec. at ¶ 23; Shubat Dec. at ¶ 9)).

and 2011—would create a risk of non-uniformity because some counties may be able to effectively verify which voters were removed in 2013 and 2011 while others may not.

The Court is concerned with the lack of reliable records in some of the county boards of elections. (*See* Doc. 80-7, Billing Decl. at ¶ 10 ("my county is not able to distinguish between individuals cancelled pursuant to the Supplemental Process and NCOA Process")). However, the alternative could possibly deny voters of their right to vote. The Court finds that the county boards of elections are already required to provide any individual who appears to vote and whose name does not appear on the voter registration rolls with a provisional ballot. Therefore, the county boards of elections are already required to determine whether each person casting a provisional ballot is qualified to vote. *See* Ohio Rev. Code § 3505.182. As part of this confirmation process, the county boards of elections will have an additional step of determining whether the person casting the provisional ballot was removed from the voter registration rolls pursuant to the Supplemental Process of 2011, 2013, or 2015. If the individual county boards of elections can confirm that the voter was removed pursuant to the Supplemental Process of 2011, 2013, or 2015, and the voter's information is the same as when he/she was purged or has moved within the same county as set forth below, then the provisional ballot must be counted, assuming the voter was not removed as deceased, incarcerated on a felony conviction, or ruled incompetent.

Therefore, the Court adopts the Secretary of State's proposed Directive with the following

changes: As to the APRI Exception on page 1, change the first paragraph to: "The individual's voter registration was cancelled in 2011, 2013, or 2015 pursuant to the Supplemental Process." As to section d. of the Instructions on page 2, change the date of cancellation to 2011 and if date of cancellation is after January 1, 2011, proceed to "step e" below. The Court finds that the Secretary of State's proposal for verification under the Statewide Voter Registration Database ("SWVRD") to determine whether a voter's registration has been cancelled if deceased, incarcerated, or incompetent is sufficient and it is not necessary to add the additional language proposed by Plaintiffs with respect to the STEVE database, etc.

The aforementioned findings apply to the scope of review of voters purged pursuant to the Supplemental Process. The remaining disputed issues are set forth below. Further, a final Temporary Restraining Order and Preliminary Injunction will be set forth in the conclusion of this Opinion and Order so as to avoid any confusion.

B. Absentee Ballot Requests

Plaintiffs argue that people who were unlawfully purged pursuant to Ohio's Supplemental process may have mailed in absentee ballot requests. And, because Ohio does not send unregistered voters absentee ballots, these people will be deprived of their right to vote by mail-in absentee. Plaintiffs request that the Secretary of State and the respective county boards of elections mail provisional ballots in response to an absentee ballot request from an unregistered voter. Plaintiffs also ask the Court to order the Secretary of State to "add a column on

its 'Provisional Supplemental Report' stating the number of individuals in each county who had [mail-in absentee] provisional ballots counted . . . ." (Doc. 74-1, Plfs.' Proposed TRO at 7).

*5 The Secretary of State responds that Plaintiffs' requested relief is not narrowly tailored or easily administered. The Secretary of State argues that sending a provisional ballot via the mail in response to an absentee ballot request from an unregistered voter has never occurred in Ohio and is contrary to Ohio law. Ohio law provides for in-person provisional ballots pursuant to Ohio Revised Code sections 3505.18 through 3505.183. There is a single, limited exception that allows for the mailing of a provisional ballot. Under Ohio Revised Code section 3503.16(G), a voter may receive a mailed provisional ballot if they are entitled to cast a provisional ballot pursuant to other subsections, and that person is disabled or confined.

The Court finds that based on the information submitted by the Secretary of State, that allowing voters to request, receive, and submit a provisional mail-in absentee ballot would fundamentally change Ohio's election procedures. Additionally, the Court finds that to impose such a remedy at this time would be unduly burdensome on the Secretary of State. Specifically, Assistant Secretary of State Matthew W. Damschroder states in his declaration:

> Provisional ballot envelopes are generally 9 inches by 12 inches – much larger than a traditional absentee ballot identification envelope designed to fit inside of a "letter rate" return envelope. As such, boards would not have on hand carrier envelopes intended to

> deliver the provisional envelope, a ballot, and a courtesy reply envelope large enough for the voter to enclose his or her provisional envelope. Further, boards would need to immediately print additional provisional ballots and prepare instructions to include with the provisional ballot mailing to inform voters why they are receiving a provisional ballot by mail. This provisional ballot mailing may be especially confusing to voters who have already received a notice of an absentee ballot deficiency from the county board of elections. After all, the early voting period has begun, and boards are processing absentee ballot applications. While the Secretary issued a Directive on Friday pursuant to this Court's Order in the above-captioned case instructing county boards to not reject absentee ballot applications due to lack of voter registration, some notices regarding absentee ballot deficiencies likely were already issued. Finally, the postage required of a voter to affix to the larger envelope in order to return a provisional ballot by mail would be significantly more than the cost to return and absentee ballot by mail.

(Doc. 80-1, Damschroder Decl. at ¶ 32). The Court finds that sending provisional ballots by mail would be undu'y burdensome on the Secretary of State.

Finally, courts have questioned and cautioned other courts in becoming involved in the minutiae of processes reserved for the states, such as the election process. Specifically in *Ohio Democratic Party v. Husted*, No. 16-3561, slip op. at 2 (6th Cir. Aug. 24,

2016), the Sixth Circuit stated that this was yet another appeal "asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes." In *Lewis v. Casey*, 518 U.S. 343, 362 (1996), the United States Supreme Court also questioned courts becoming "unmeshed in the minutiae" of state prison operations and suggested "adequate consideration to the views" of state officials. Accordingly, the Court finds the state election officials' statements regarding sending provisional ballots by mail to be persuasive and **DENIES** such a remedy in this case. Because the Court is not ordering the use of mail-in absentee provisional ballots, the Court **DENIES** Plaintiffs request to order the Secretary of State to alter the Provisional Supplemental Report to account for mail-in absentee provisional ballots.

***6** Currently, pursuant to the Court's October 14, 2016 Order, the Secretary of State has issued Directive 2016-37 instructing all county boards of elections not to reject any absentee ballot applications, whether received by mail or in person until further instructions are provided by the Secretary of State. However, according to the Secretary of State's responsive pleading, there are absentee ballot requests that have already been processed and denied. There is no practical way for Secretary Husted to remedy that. However, as for the applications that have not been processed or were rejected, but not sent notifications to date, the Secretary of State shall include in the notification of denial to any nonregistered voters that they may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on

Election Day at the correct polling place for the voter's current address. This will ensure that all unregistered voters who requested an absentee ballot by mail will not be denied the opportunity to vote and can cast a provisional ballot early or on Election Day.

C. Change of Address within Same County

Another point of contention between the parties centers around whether voters who were purged by the Supplemental Process must currently reside at the same address they did when they were unlawfully removed from the voter rolls in order for their in-person provisional ballot to be counted. The Secretary of State proposed that provisional ballots should only be counted for previously purged voters who still reside at the same address they did when they were purged pursuant to the Supplemental Process. (Doc. 72, Mot. to Impl. at 2; Doc. 72-1, proposed Directive at 1). Secretary Husted notes that this remedy mirrors what Plaintiffs previously requested. Conversely, Plaintiffs request that purges voters' provisional ballots be counted even if they have moved residences within their county since the time they were purged from the voter rolls. (Doc. 74-1, Pls.' Proposed TRO at 4-5). Plaintiffs note that their earlier requests for a remedy similar to Secretary Husted's proposed remedy were premised on Secretary Husted's representations that there was no other way to identify the purged voters, but evidence has since come to light to nullify that position. (Doc. 74, TRO Mot. at 3, n.1).

Ohio Revised Code § 3503.16 sets forth the requirements for voters who change residences or names. In general, a voter must report a change of

address regardless of whether they are moving intra-precinct, intra-county, or intra-state. Ohio Rev. Code § 3503.16(A). If a registered voter moves to a new residence within the same precinct in which he or she previously resided but fails to file a change of address form, they are not precluded from casting a regular ballot in person. Said voters are still able to appear at their assigned polling location, provide one of the accepted forms of identification confirmation, and cast a regular ballot. Ohio Rev. Code §§ 3503.16(A) and (B)(1)(a).

This scenario, of course, does not take into consideration that the voter may have been unlawfully purged in the interim. In light of the current state of affairs, poll workers have no immediate way of cross-checking the voter's new address with their prior address if they have been purged from the voter rolls. Recognizing this reality, Plaintiffs have requested that purged voters who move intra-precinct be treated the same as voters who move to a different precinct within the same county. The Court agrees with Plaintiffs that equal treatment for all purged voters who moved within their county since their cancellation—regardless of whether they stayed in their same precinct—is the only workable solution.

Under Ohio law, a registered voter who moves to a new precinct within the same county is also not barred from casting a ballot simply because they failed to submit a change of address form. Under these facts, a voter may cast a provisional ballot by appearing at an appropriate polling location for the precinct in which the person resides, completing and signing the written affirmation on the provisional

ballot envelope (which serves as a notice of change of residence), and completing and signing a statement attesting that the registered elector moved and has voted a provisional ballot. Ohio Rev. Code § 3503.16(B)(2)(a)-(d). It is worth nothing that the written ballot affirmation ("Form No. 12-B"), as described in Ohio Revised Code § 3505.182, requests the same information and identification verification as the standard "Voter Registration and Information Update Form" that is widely available. Specifically, Form No. 12-B requires a provisional voter to provider their full name, date of birth, current address, former address (optional), and Ohio driver's license number, state identification card number, or the last four digits of their Social Security number. Form No. 12-B also requires a sworn affirmation and signature. In short, Form No. 12-B provides election officials with the same safeguards and information that a normal voter's registration form would include. Accordingly, by requiring election officials to tabulate these provisional ballots, the Court finds no undue burden on election officials nor does the Court find any increased risk for abuse of the voting process.

*7 In light of the Sixth Circuit's holding that Secretary Husted—by way of the Supplemental Process—unlawfully removed voters from the state's voter rolls, the Court finds Secretary Husted's proposed remedy untenable. If the Court were to accept the position that provisional ballots need only be counted for voters who currently reside at the same address they did when they were purged, voters who have moved intra-precinct or intra-county would be denied rights that they would have enjoyed had they not been unlawfully purged under the

Supplemental Process. In short, these voters should still be able to cast a provisional ballot and have it be counted if they are able to comply with the additional requirements set forth in Ohio Revised Code § 3503.16 *et seq.*, despite the fact that they have moved residences.

As noted above in Section II.A., if a voter appears at her proper polling location and her name does not appear in the voter rolls, she may cast a provisional ballot. In the weeks following the election, her county board of elections will check their past voter rolls to determine if she was registered to vote in that county at the time of her cancellation. If so, the board shall determine if she falls within the APRI Exception as set forth in Secretary Husted's proposed Directive 2016-XX (as modified by this Opinion and Order). If the board of elections does not have any information indicating that she was deceased, incarcerated on a felony conviction, or adjudicated incompetent, and it is determined that she was not lawfully purged from the voter rolls through the NCOA process, there is a presumption that she was unlawfully purged pursuant to the Supplemental Process and her provisional ballot should be counted. If a board does not possess the information to determine whether she was purged under the NCOA Process or the Supplemental Process, then the board must contact the appropriate Secretary of State's elections counsel, which will then make a determination after checking past NCOA lists. With the information before it, the Court does not think this process places an undue burden on the county boards of elections of the Secretary of State. Accordingly, the Court hereby **ORDERS** that all such votes be counted provided there is no

independent basis which otherwise would render those votes void. The Court also notes that there is a strong likelihood that voters not currently in the voter rolls have been lawfully removed as a result of the NCOA Process.

D. Additional Communications to Voters

Plaintiffs have requested that this Court order the Secretary of State to communicate to prospective voters regarding the voters' ability to vote provisionally should the voter believe they are not registered to vote. The Secretary of State did not specifically address Plaintiffs' request for changes to the Secretary of State's website or the requests regarding telephonic and online assistance to voters. However, the Secretary of State objects to Plaintiffs' request that the Secretary of State take out advertising efforts to inform voters that they may vote provisionally. The Court will address each below.

1. Website Alterations

Plaintiffs request that new language be added to the "MyOhioVote.com" and "http://voterlookup .sos.state.oh.us" webpages of the Secretary of State containing the online "Voter Lookup" tool. Plaintiffs request that the following language be added:

> If you are unable to locate your voter registration information but think you are registered to vote, and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot either during in-person absentee voting period or at the correct polling place for your current address that may be counted pursuant to court

> order. To find your polling place, please click here or call your county board of elections.

*8 (Doc. 74-1, Pls.' Proposed TRO at 7). Additionally, Plaintiffs' Proposed TRO calls for a hyperlink be placed on the words "pursuant to court order" and that "[t]he phrase 'click here' will be a hyperlink to the online [polling location locator] resource. The phrase 'call your county board of elections' will be a hyperlink to a list of the phone numbers of all of Ohio's 88 county boards of elections." (*Id.*) Last, Plaintiffs request that the Secretary of State direct each county that operates its own online voter lookup tool to add the language described above, including the hyperlinks, to the webpage containing that tool." (*Id.*)

The voter lookup tool currently presents the following statement when a search query returns no results:

> We could not locate your voter registration with the information you provided. Please double check your entries below. If you have entered the correct information in the correct fields, we encourage you to check your registration status by contacting your local county board of elections. Click here for a full listing of Boards of Elections.

Voter Search, *My Voter Information*, Ohio Secretary of State, http://voterlookup.sos.state.oh.us/voterlookup.aspx (last visited October 18, 2016). The Court finds that a remedy similar to that suggested by the Plaintiffs is not unduly burdensome on the Secretary of State and will properly assist voters with finding the proper polling place and casting a provisional ballot if their registration was

cancelled. Further, the Court agrees with Plaintiffs that if a county operates a voter lookup tool, the county should offer some directions to a voter who believes they are registered but receives no results in response to a query. However, the Court also recognizes the reality that all counties who operate a voter lookup tool may not have the staffing or time necessary to make the changes requested by Plaintiffs.

Accordingly, the Secretary of State is **ORDERED** to change the language in the voter lookup tools "MyOhioVote.com" and "http://voterlookup.sos.state.oh.us" webpages of the Secretary of State to the following when the tool fails to pull up a voter's registration:

> We could not locate your voter registration with the information you provided. Please double check your entries below. If you are unable to locate your voter registration information but think you are registered to vote and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address that may be counted. We encourage you to check your registration status by contacting your local county board of elections. To find your polling place, please click here or call your county board of elections. Click here for a full listing of Boards of Elections.

(Doc. 74-1, Pls.' Proposed TRO at 8). The phrase "please click here" will be a hyperlink to the online "Voter Toolkit" which contains an option for "Find My Polling Location." *Voter Toolkit*, Secretary of State, https://www.sos.state.oh.us/SOS/Upload/sites/ballotTracking/ballotTracking.aspx?page=20547 (last visited October 18, 2016). The phrase "Click here for a full listing of Boards of Elections" will continue to be a hyperlink to a list of the contact information of all of Ohio's 88 county boards of elections. The Secretary of State shall also add the following phrase to all result pages in the voter lookup tool in the event that the tool provides other properly registered voters but not the voter who conducted the search:

> ***9** If you are unable to locate your voter registration information but think you are registered to vote and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address that may be counted. We encourage you to check your registration status by contacting your local county board of elections. To find your polling place, please click here or call your county board of elections. Click here for a full listing of Boards of Elections.

This notice shall have the same hyperlinks as the notice above.

The Secretary of State will also direct all counties which operate their own voter lookup tools to add the

language and hyperlinks noted above to the extent possible given the noted time and staffing constraints. Last the Court **DENIES** Plaintiffs' request to require the Secretary of State to "continue to provide online and telephonic resources in response to voter inquiries to assist voters in determining the correct polling location and precinct for their address." As Plaintiffs admit that this is already occurring, there is no need for such an order.

2. Advertising and Promotion Efforts

Plaintiffs' final request is that the Court orders Secretary Husted to:

> undertake additional efforts to inform and educate the public concerning how voters whose registrations were cancelled under the Supplemental Process may participate in the November 2016 General Election, including making public service announcements via television, radio, and social media, and posting information on the Secretary's web site.

(Doc. 74-1, Pls.' Proposed TRO at 8). The Secretary of State asserts that this would be impracticable due to time constraints, costs, and the requirements with which the Secretary of State must comply to purchase advertising, to employ advertising firms and those necessary to produce such advertisements. Secretary Husted notes that the Controlling Board would have to approve the costs at a meeting for which the application deadline has already passed and that an advertising buy in September cost approximately $550,000.

The Court agrees with the Secretary of State that the requested relief is impracticable in the time that

is currently remaining before the election. Plaintiffs' motion and Proposed Temporary Restraining Order offer no justification for the necessity of this relief or how the relief requested is narrowly tailored to the address the harm in this case. As Plaintiffs have noted in earlier motions before the Court, the primary concern is that "many cancelled voters will show up to vote in the November 2016 General Election, only to be told they are unregistered and therefore unable to vote." (Doc. 9, Mot. Prelim. Inj. at 21; *see also* Doc. 9-4, Harmon Decl. at ¶ 8 (found out he was not registered upon arrival at the polling location); Doc. 9-5, McCullough Decl. at ¶ 11 (same)). Plaintiffs' proposed relief offers no benefit to the harm alleged. Voters who believe they are registered will show up on Election Day and be allowed to cast a provisional ballot under the relief granted. Accordingly, Plaintiffs' request for the Secretary of State to conduct an advertising campaign is **DENIED**.

IV. CONCLUSION

Based on the foregoing, Defendant's Motion to Implement Remedy and Plaintiffs' Second Motion for Temporary Restraining Order are **GRANTED IN PART** and **DENIED IN PART**. The Court finds that the aforementioned remedies are in accord with the Sixth Circuit's decision in *A. Philip Randolph Inst.*, 2016 WL 5328160 and the purposes of the NVRA, which include: "to protect the integrity of the electoral process;" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501.

***10** The Secretary of State is hereby **ORDERED** to issue a directive no later than Friday, October 21,

2016 in a form substantially similar to the language below. The Court approves of any formatting changes deemed appropriate by the Secretary of State so long as they do not substantively alter the Court's approved language. The following Temporary Restraining Order and Preliminary Injunction shall remain in effect through the November 8, 2016 General Election and subsequent tabulation period:

PURPOSE

For purposes of the November 8, 2016 General Election, a provisional ballot cast during the in-person absentee voting period or on Election day by a voter who is not registered to vote in the State of Ohio may be counted if all of the following apply (the "*APRI* Exception"):

1. The individual's voter registration was cancelled in 2011, 2013, or 2015 (confirmation card mailed in 2007, 2009, or 2011) pursuant to the Supplemental Process;

2. The voter's provisional ballot affirmation reflects an address within that precinct and the voter was previously registered to vote within that same county prior to cancellation;

3. The board of elections does not have information that the voter was deceased, incarcerated on a felony conviction, or adjudicated as incompetent under Ohio law by a county probate court after the individual's registration record was cancelled; and,

4. The voter's provisional ballot affirmation form and the ballot otherwise comply with all applicable laws and directives.

INSTRUCTIONS

Boards must apply the *APRI* Exception to the provisional ballot eligibility determination of any provisional voter who is not registered to vote in the State of Ohio at least 30 days before the election. If the board determines, as evidenced by the voter having a "cancelled" status in the Statewide Voter Registration Database (SWVRD), that the voter previously was registered to vote in the State of Ohio, it must count the provisional ballot using the following steps in conjunction with the mandatory process for determining eligibility of provisional ballots in Chapter 6, Provisional Voting, of the Ohio Election Official Manual:

a. Identify the most recent address of registration in the Statewide Voter File for the voter (because merged records can result in multiple records for a single voter, it is necessary to identify the most recent address of registration on file prior to cancellation). Proceed to "step b" below.

b. If the most recent address of registration in the Statewide Voter File for the voter is in a different county than the address provided by the voter on the provisional affirmation, the board must reject the provisional ballot. If the most recent address of registration in the Statewide Voter File for the voter is the same as the address provided by the voter on the provisional affirmation or is in the same county, proceed to "step c" below.

c. Identify the "reason" code in the SWVRD. If the reason code is "Cancelled – Deceased," "Cancelled – Incompetent," or "Cancelled – Incarcerated" the board must reject the provisional ballot. (A "merged" record is not a

"cancelled" record.) If the reason code is something other than death, adjudication of incompetency by a probate judge, or incarceration on a felony conviction, proceed to "step d" below.

d. Identify the date of cancellation in the SWVRD. If the date of cancellation is prior to 2011, the board must reject the provisional ballot. If the date of cancellation in the SWVRD is after January 1, 2011, proceed to "step e" below.

*11 e. Determine if the voter was cancelled under the "Supplemental Process" of the state's general voter records maintenance program.

If the board's records do not differentiate between a cancellation under the "NCOA Process" and a cancellation under the "Supplemental Process," the board must contact the Secretary of State's elections counsel assigned to its county. The Secretary of State's elections counsel will compare the information from the voter's provisional ballot affirmation to the NCOA list from the year in which the voter was sent a confirmation notice (four years prior to the year of cancellation).

The Secretary's Office shall possess the NCOA lists from 2007, 2009, and 2011. A county seeking to determine whether an individual is on the NCOA list in accordance with subsection (b) above shall contact the Secretary's Office, which shall provide the county with a prompt response.

The provisional ballot of a voter whose registration was cancelled under the "NCOA Process" cannot be counted under the *APRI* Exception. If the

voter's registration was cancelled under the "NCOA Process," the board must reject the provisional ballot.

The provisional ballot of a voter whose registration was cancelled under the "Supplemental Process" must be counted under the *APRI* Exception if the provisional ballot affirmation and the provisional ballot otherwise comply with all applicable laws, as directed in the mandatory process for determining eligibility of provisional ballots in Chapter 6, Provisional Voting, of the Ohio Election Official Manual.

ADDITIONAL INSTRUCTIONS

• The board must provide ballots and envelopes in the quantity of at least 15 percent more than the number of provisional ballots cast in that precinct at the 2008 or 2012 Presidential General Election, whichever is higher.[4] Additionally, each board must provide to each precinct and/or polling location a stock of provisional ballot affirmation envelopes (containing Secretary of State Form 12-B) that is greater than the number of provisional ballots being provided for this election. Be mindful of the proper allocation of ballot and envelope quantities across precinct splits. Additionally, any multi-precinct polling location must have a sufficient supply of Secretary of State Form 12-D.[5]

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[4] This is a minimum requirement for preparedness, not a prediction for the number of provisional ballots expected to be cast this election or as a result of the APRI Exception.

[5] For all information relative to ballot quantities for the November 8, 2016 presidential general election, *see* Directive 2016-35.

• Boards of elections will be required to provide the total count of provisional ballots counted using the APRI Exception separate from all other counted provisional ballots when the board submits its supplemental report at the conclusion of the official canvass following Election Day.

• Boards of elections are required to add the following language to any web tool used to aid voters in searching for their registration information:

> o If you are unable to locate your voter registration information but think you are registered to vote and you have not moved outside of your county of prior registration, you may be eligible to cast a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address that may be counted. We encourage you to check your registration status by contacting your local county board of elections. To find your polling place, please click here or call your county board of elections. Click here for a full listing of Boards of Elections.

*12 • With respect to absentee ballot request forms, submitted in person or by mail, that have not already been processed and/or rejected by the Secretary of State and the respective boards of elections, the following language shall be included in the notification

of denial of the request for absentee voter to any nonregistered voter:

> o You may still case a provisional ballot during in-person absentee voting period at an appropriate early voting location or the county board of elections, or on Election Day at the correct polling place for your current address.

Following the Court's Order permitting Defendant to file a reply brief, Plaintiffs filed a Motion to Withdraw their reply, which is **DENIED as moot**. Additionally, the Ohio Democratic Party's Motion for Leave to file its Amicus Curiae Brief is **GRANTED**. The Clerk of this Court shall remove Documents 72, 74, 78, and 86 from the Court's pending motions list. The parties shall submit a Joint Proposed Scheduling Order following the 2016 General Election regarding final merits briefing on the resolution of this case.

IT IS SO ORDERED.

APPENDIX D

52 U.S.C.A. § 20507
Formerly cited as 42 U.S.C.A. § 1973gg-6

§ 20507. Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not

returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to

an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the

identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

CREDIT(S)

(Pub.L. 103-31, § 8, May 20, 1993, 107 Stat. 82; Pub.L. 107-252, Title IX, § 903, Oct. 29, 2002, 116 Stat. 1728.)

APPENDIX E

52 U.S.C.A. § 21083
Formerly cited as 42 U.S.C.A. § 15483

§ 21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after

October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters--

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that--

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes--

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause

(ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration

system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of Title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--

(A) the individual registered to vote in a jurisdiction by mail; and

(B)(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual--

(i) in the case of an individual who votes in person--

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot--

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that

shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 21082(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 21082(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person--

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either--

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)(i) who registers to vote by mail under section 6 of the National Voter Registration

Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either--

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is--

(i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act;

(ii) provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection

(b) on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) shall apply to any individual who registers to vote on or after January 1, 2003.

CREDIT(S)

(Pub.L. 107-252, Title III, § 303, Oct. 29, 2002, 116 Stat. 1708.)